

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

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4 MELISSA TROSTLE,

5 Plaintiff,

6 - against - Civil No: 1:13-CV-0709

7 THE STATE OF NEW YORK,
8 THERESA KNAPP-DAVID, AND
9 DOUG BOTSFORD,

10 Defendants.
11 -----

12 DEPOSITION of Defendant, by its Agent, DANIEL F.
13 MARTUSCELLO, III, held on the 17th day of October 2014,
14 commencing at 12:05 p.m., at the Law Offices of Elmer
15 Robert Keach, III, P.C., One Pine West Plaza, Suite 109,
16 Washington Avenue Extension, Albany, New York
17 12205-5531, before Jeanne O'Connell, Registered
18 Professional Reporter and Notary Public in and for the
19 State of New York.
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ORIGINAL

1 APPEARANCES:

2 For the Plaintiff:

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7 By: Elmer Robert Keach, III, Esq.

8 For the Defendants:

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S T I P U L A T I O N S

It is hereby stipulated and agreed by
and between the attorneys for the respective
parties hereto that:

All rights provided by the C.P.L.R.,
and Part 221 of the Uniform Rules for the
Conduct of Depositions, including the right
to object to any question, except as to form, or to move
to strike any testimony at this examination is reserved;
and in addition, the failure to object to any question
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shall not be a bar or waiver to make such motion at, and
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This deposition may be sworn to by the
witness being examined before a Notary Public other than
the Notary Public before whom this examination was
begun, but the failure to do so or to return the
original of this deposition to counsel, shall not be
deemed a waiver of the rights provided by Rule 3116 of
the C.P.L.R., and shall be controlled thereby.

The filing of the original of this
deposition is waived.

IT IS FURTHER STIPULATED, that a copy
of this examination shall be furnished to the attorney
for the witness being examined without charge.

1 DANIEL F. MARTUSCELLO, III, after first having been duly
2 sworn, was examined and testified as follows:

3 EXAMINATION

4 BY MR. KEACH:

5 Q. Mr. Martuscello, my name is Attorney Bob Keach,
6 civil rights lawyer. You're being deposed in my office
7 here in Albany, New York.

8 I'm here to ask you some questions today about a
9 lawsuit that's been filed by Melissa Trostle against New
10 York State and several employees of the New York State
11 Department of Corrections.

12 You are not a defendant in this case. You
13 understand that, right?

14 A. I do.

15 Q. And you understand that I am deposing you in your
16 capacity as a third party to get factual information
17 that may be in your possession that is relevant to these
18 proceedings.

19 A. I do.

20 Q. You've been deposed before, sir.

21 A. I have.

22 Q. On how many occasions?

23 A. Once.

1 Q. For what reason?

2 A. A case involving a termination of a temporary
3 employee with the department.

4 Q. Who would that be?

5 A. I don't recall her name.

6 Q. And what agency or what unit did that temporary
7 employee work in?

8 A. Mount McGregor Correctional Facility, I believe.

9 Q. Were they a corrections officer or something
10 else?

11 A. Something else.

12 Q. Was there an allegation in that case of racial
13 discrimination?

14 A. No. Not that I recall.

15 Q. Do you know why the temporary employee lost their
16 job?

17 A. Over-familiarity with inmates.

18 Q. Does that mean they were having sex with inmates?

19 A. No.

20 Q. It just means they knew too many of them.

21 A. No.

22 Q. Or it means they were too friendly with them.

23 A. Yes.

1 Q. Have you ever been sued before?

2 A. I believe so.

3 Q. Were you sued as part of this situation with the
4 gentleman who was terminated or a man or woman who was
5 terminated for being overly familiar with inmates?

6 A. I don't know that I was actually named in that
7 case or not, but I was deposed.

8 Q. Well, have you been sued on another occasion to
9 the extent that you were sued in the first instance,
10 which we're not sure that you were?

11 A. I believe that I've been named in other suits in
12 my capacity working for the department.

13 Q. But you've never been deposed in any of them.

14 A. Correct. I was deposed in one other case.

15 Q. What was that about?

16 A. That was about a case when I was employed as a
17 correction officer at Greenhaven Correctional Facility,
18 and the inmate was alleging lack of medical care.

19 Q. Any other times?

20 A. Not that I can recall.

21 Q. Were you ever deposed in a court under oath, or
22 have you ever testified in court?

23 A. I have testified in court.

1 Q. For what reasons?

2 A. During my employment. I was in my official
3 capacity. I was the department's designee to testify in
4 court relative to certification of records.

5 Q. Any other reason?

6 A. I testified in court in a TRO hearing for a
7 temporary restraining order in the closure of a prison.

8 Q. Gosh, somebody was trying to keep the prison from
9 being closed down, the union or something.

10 A. Correct. I don't know that it was the union,
11 but...

12 Q. Someone was trying to keep the prison from
13 closing.

14 A. Correct.

15 Q. And you had to testify in that.

16 A. Correct.

17 Q. Any other occasions?

18 A. No.

19 Q. What's your current job title?

20 A. I am the deputy commissioner for administration
21 with the Department of Corrections and community
22 supervision.

23 Q. At some point in time did you fill the role of

1 director of human resources?

2 A. I did.

3 Q. And what does the director of human resources do
4 at the Department of Corrections?

5 A. As the director of human resources, you're
6 charged with responsibility to recruit, hire, and retain
7 competent workforce to achieve the mission, and also
8 provide guidance relative to personnel practices,
9 administering personnel practices in New York State, as
10 well as act as the centralized -- the commissioner's
11 centralized appointing authority, dealing with all
12 matters related to personnel management but not the
13 disciplinary process.

14 Q. Well, let's step back here a minute.

15 Who is responsible for determining disciplinary
16 issues in terms of pressing notices of discipline and
17 employees and the like?

18 Is that you or someone else -- you in your role
19 as director of human resources, excuse me, or something
20 else?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: That was not me in my
23 director of human resources capacity.

1 BY MR. KEACH:

2 Q. Then who would make those decisions about
3 pressing notices of discipline?

4 A. The issuances of notice of discipline would rest
5 with the director of the Bureau of Labor Relations.

6 Q. When you say the Bureau of Labor Relations, that
7 would be part of DOCCS, or is that somewhere else?

8 A. It's a bureau within the Department of
9 Corrections and Community Supervision.

10 Q. Now, you, as the director of human resources,
11 would have the ability to refer people to -- give me the
12 name of the -- labor relations.

13 A. Labor relations.

14 Q. You would be able to refer people to labor
15 relations if you felt that was appropriate, wouldn't
16 you?

17 A. Yes.

18 Q. Going forward, when I'm asking you questions, I'm
19 going to refer to your role as the director of human
20 resources. So, I don't want to have to keep stopping
21 because it's just going to make things a lot more
22 complicated.

23 I'll figure out what your new position is in

1 terms of being the associate commissioner for
2 personnel -- or excuse me, for administration, at a
3 later time. But the questions I'm obviously interested
4 in are at the times relevant to Mrs. Trostle's
5 situation, which would have been in the spring and in
6 the summer of 2011, and then what happened afterward.

7 So, can you and I go forward with that
8 understanding, that I'm going to ask you questions about
9 your role of director of human resources and not your
10 current job?

11 A. That's fine.

12 Q. So, I'm assuming, when you were the director,
13 that you would get calls from all over the state from
14 all of these various facilities asking you questions
15 about various personnel issues, correct?

16 A. Yes.

17 Q. And you would get calls saying, hey, for
18 instance, we caught someone doing something bad, what
19 should we do; fair to say?

20 A. Not necessarily.

21 Q. You never got a phone call from someone calling
22 you saying, we caught someone doing something bad, what
23 should we do, caught someone breaking the rules,

1 breaking policies, how should we handle this?

2 A. Yes. But it depends on the status of the
3 employee.

4 Q. Why would it depend on the status of the
5 employee?

6 A. As the director of human resources, I would be
7 involved in providing guidance relative to probationary
8 employees, temporary employees, or provisionally
9 appointed employees. But any employee that had personal
10 retention and was covered by Section 75 of the civil
11 service law, those calls would go to the director of
12 labor relations.

13 Q. Because there would be a whole separate set of
14 rights for people that were not in the status that you
15 just described as it relates to due process and notices
16 and that sort of thing; fair to say?

17 A. Correct.

18 Q. So, if a probationary employee -- let's just talk
19 about that.

20 COs, when they first start working for DOCCS,
21 they're on probation for like a year, right?

22 MS. RUBINSTEIN: Objection.

23 THE WITNESS: Correct.

1 BY MR. KEACH:

2 Q. And then at any point in time during that
3 probationary year, if DOCCS decides they don't want to
4 retain that person, they can release them, and they
5 won't have any sort of due process rights in terms of
6 notice of discipline and hearing and that sort of thing;
7 fair to say?

8 A. Correct.

9 Q. That gives DOCCS the opportunity to basically
10 say, this person is not working out, we're going to let
11 them go, and we don't have to deal with -- during this
12 probationary period, we don't have to deal with putting
13 them through PERB and the disciplinary process; fair to
14 say?

15 MS. RUBINSTEIN: Objection.

16 THE WITNESS: Correct.

17 MR. KEACH: She's objecting to how I
18 posed my question, but you should answer it
19 unless she tells you not to.

20 THE WITNESS: Thanks.

21 MR. KEACH: I'm sure you already know
22 that already.

23 THE WITNESS: I appreciate that.

1 MR. KEACH: I'm not trying to insult
2 you. You're obviously an intelligent guy.
3 It's just we're just laying the ground
4 rules.

5 BY MR. KEACH:

6 Q. And so, if someone has a provisional appointment,
7 then someone can come to you and also take steps to
8 address the provisional appointment.

9 A. Correct.

10 Q. Aren't most of the individuals that are employed
11 at the central office provisional employees?

12 A. No.

13 Q. At the time of these events, weren't most of the
14 individuals that were employed in the office of
15 classification and movement provisional employees?

16 A. I don't know if most is accurate or not. There
17 were provisional employees assigned to class and
18 movement.

19 Q. Classification analysts were provisional
20 employees, were they not?

21 A. Not all of them. But, yes, they were.

22 Q. And then how about individuals that would be in
23 the role of assistant director, director, would they be

1 provisional employees?

2 A. The assistant director was, not the director.

3 Q. Why wasn't the director?

4 A. To my recollection.

5 Q. Why wouldn't the director be a provisional
6 employee?

7 Let me step back.

8 The director, I think they have some sort of
9 classification in the state called
10 "management/confidential" or something like that.

11 Did you ever hear of that?

12 A. Yes.

13 Q. And it's basically you serve at the pleasure of
14 the commissioner, and if it doesn't work out the
15 commissioner lets you go.

16 Is that fair to say?

17 MS. RUBINSTEIN: Objection.

18 THE WITNESS: That's not what
19 management/confidential is.

20 BY MR. KEACH:

21 Q. Well, I've heard that term actually associated
22 with people in the attorney general's office.

23 What does that mean?

1 A. What does what mean?

2 Q. Management/confidential.

3 A. It's somebody that's been designated as either
4 someone in a management role and/or serving in a
5 confidential capacity dealing with certain types of
6 work. And there's parameters that civil service guides
7 on what types of positions fall into management or
8 confidential work. But you can be a permanent
9 competitive employee and not serve at the pleasure and
10 still be management/confidential.

11 Q. Well, what was the designation that would be
12 associated with Mrs. Trostle's position as the assistant
13 director for classification and movement in 2011?

14 A. I believe it's management/confidential.

15 Q. And so, if someone wanted to terminate the
16 employment of someone in a management/confidential
17 position, would they have to comply with civil service
18 rules or would they not have to?

19 A. It depends on their employment status.

20 Q. And so, what was Mrs. Trostle's employment status
21 in 2011 when she was removed from her position as
22 assistant director of classification and movement?

23 A. She was a provisional in the title of assistant

1 director.

2 Q. And so, that provisional appointment allowed her
3 to have that provisional appointment removed without
4 having to go through the disciplinary process.

5 Is that fair to say?

6 A. Disciplinary process as defined by Article 75 of
7 the civil service law. That's correct.

8 Q. Well, what I understand -- I don't know if it's
9 defined by Section 75 or how it works, but in the past,
10 when I've -- and I have on one occasion represented a
11 corrections lieutenant who was, I feel, wrongfully
12 fired, but I lost the case.

13 But regardless, I represented this man until he
14 was given a notice of discipline that he was given a
15 hearing before PERB. He was exonerated during the
16 hearing before PERB. It was determined he was
17 wrongfully terminated and went back to work.

18 Is that what you understand also of what would
19 happen under Section 75?

20 A. Yeah. The discipline provisions. Correct.

21 Q. Now, did you know prior to your involvement in
22 this -- and I'll try to figure out when that is in a
23 minute, but prior to your involvement in this, did you

1 have any interaction with Melissa Trostle at all?

2 A. No.

3 Q. You didn't know the lady, did you?

4 A. I may have seen her in the hall in passing, but I
5 had very limited experience with class and movement.

6 Q. And I mean, it's not like you never worked with
7 her -- where did you work as a CO?

8 A. I worked at Greenhaven Correctional Facility.

9 Q. Now, I'm assuming you probably worked at some
10 other facilities as well on a limited basis, or were you
11 always at Greenhaven?

12 A. I did a week at Bedford Hills and on-the-job
13 training for two weeks at Cocksackie. Other than that,
14 Greenhaven.

15 Q. So, you never met Mrs. Trostle before you came to
16 central office. That's fair to say, right?

17 A. Correct.

18 Q. And other than seeing her pass by in the hall,
19 you didn't know anything about her before you were
20 involved in her situation about terminating her
21 provisional employment; fair to say?

22 A. Correct.

23 Q. Now, there's been some discussion in this case

1 about a program that's put in place about monitoring
2 people who have time and attendance issue.

3 Do you know anything about that?

4 A. I do.

5 Q. Explain to me -- well, I'll explain to you what
6 my understanding of the program is just so we can try to
7 talk about the same thing. I may describe it
8 differently than you would, and then we'll go forward.

9 My understanding is that if an employee has time
10 and attendance issues, that they can be referred I
11 believe it would be to your department for monitoring
12 for time and attendance. And this is a -- it's a
13 preventative or proactive measure to say, okay, you've
14 been having time and attendance issues, so we're going
15 to put a special monitoring on you to get you to conform
16 and to stop having these problems. And if you keep
17 having these problems, then we may take extra action.

18 Do you know about the program that I described?

19 MS. RUBINSTEIN: Objection.

20 THE WITNESS: I don't know if the
21 program is quite as you describe it, but I
22 am familiar with the attendance control
23 program.

1 BY MR. KEACH:

2 Q. Attendance control program, okay.

3 And what is the attendance control program?

4 A. The attendance control program is a department
5 policy in the form of a directive that is administered
6 by the central office bureau of personnel as well as at
7 each of our institutions, and it tracks the number of
8 occasions of absence, unscheduled absences, and it
9 counts them as an employee, as they occur in the
10 employee's course of work. And there are certain
11 thresholds and triggers when you reach a certain number
12 of occasions of absences as prescribed in the directive.

13 When it comes to tardiness, we do not have those
14 thresholds to be met. Tardinesses are dealt with on
15 more of a case-by-case basis with the individual
16 facility or unit as depending on the job type. One
17 instance of tardiness may warrant corrective action as
18 opposed to other jobs. It may be different.

19 Q. Now, when you're in central office, you don't
20 punch a timecard when you come to work there, do you?

21 A. We do not.

22 Q. And so, are there occasions where you've been
23 late to work when you worked at central office?

1 A. I'm sure I've been late. Not often.

2 Q. Well, I'm not -- I didn't mean that in some
3 pejorative way. I was late today because I was on the
4 phone with a realtor. So, I don't mean that in a
5 critical way.

6 So, what would you do if you came in late, you
7 came in five minutes late? How would you deal with it,
8 just stay five minutes extra to make up the time?

9 A. I typically don't work eight hours, so. But I
10 would notify my supervisor that I was late and either
11 charge appropriate accruals or a schedule adjustment as
12 approved by my supervisor.

13 Q. Well, not everybody does it as formal as that, do
14 they?

15 MS. RUBINSTEIN: Objection.

16 THE WITNESS: I can't speak to what
17 everyone does.

18 BY MR. KEACH:

19 Q. Well, let's assume for the moment that you're a
20 secretary and you come in five minutes late because you
21 got caught in traffic or whatever it is. And so, you
22 say to your boss, hey, I was five minutes late so I'll
23 stay five minutes after time today to make it up, do you

1 care?

2 Wouldn't that be something that would be in the
3 ordinary course of business in the Department of
4 Correctional Services?

5 MS. RUBINSTEIN: Objection.

6 THE WITNESS: That could be something
7 that could be worked out. Yeah.

8 BY MR. KEACH:

9 Q. Well, when I was five minutes late, I'll take it
10 out of the lunch hour or I won't take a break in the
11 afternoon, something like that, right?

12 A. No. Not with your lunch hour or your breaks.

13 Q. But people could stay after time or whatever it
14 is; fair to say?

15 A. That's fair, with a supervisor's approval.

16 Q. And so, absences are monitored but not tardiness;
17 is that accurate?

18 A. Correct.

19 Q. Because I was left with a contrary impression
20 from earlier testimony that tardiness could be part of
21 this attendance monitoring program, as well.

22 A. It can be.

23 Let me rephrase my answer to the previous

1 question.

2 It can be part of the program, but it's not
3 prescribed with certain thresholds as is occasions that
4 are --

5 Q. Got you. I didn't mean to cut you off. I
6 apologize.

7 Go ahead.

8 A. Occasions of absence, there's thresholds such
9 that on nine occasions warrants informal. And then
10 there's progressive steps until which point it can be
11 referred to a notice of discipline. It's not so
12 prescribed for tardiness.

13 Q. I understand. So you've got different, just like
14 you said, nine days. You're out nine days unexcused or
15 something like that, then this is what happens.

16 But the attendance monitoring program can also be
17 used to monitor tardiness; it just doesn't have the
18 threshold, right?

19 A. Correct.

20 Q. And so, if someone puts someone on attendance
21 monitoring for tardiness and they continued to be tardy,
22 then it would be treated on a case-by-case basis versus
23 having certain concrete thresholds as part of the

1 policy.

2 A. Can you repeat the question.

3 Q. Sure. If someone is put on this program because
4 of tardiness problems and they continue to be tardy,
5 that would be subject to a case-by-case analysis versus
6 being guided by some sort of threshold about the number
7 of times or the amount of times they're tardy.

8 A. You don't get put on the program. It is a
9 program that's subject to all employees.

10 Q. Once you reached certain levels or have problems,
11 isn't there a higher level of monitoring for some
12 individuals?

13 A. Yes.

14 Q. What's that higher level of monitoring called?

15 A. It's part of the attendance control program.
16 It's just at a different step in the process, if you
17 will.

18 Q. Well, I just want to be clear. Let's assume that
19 I work in your agency, as hard as that is to assume,
20 right? But I work in your -- I've sued your agency
21 like, I don't know, 30 times.

22 But anyway, regardless, let's assume for the
23 purposes of this hypothetical that I work at your

1 agency, and I've got a secretary out there, Kelly. She
2 keeps coming in every day. She's five minutes late.

3 Don't I have the ability to come to -- and you
4 called it personnel.

5 A. Mm-hmm.

6 Q. Is personnel different than the director of human
7 resources?

8 A. No. The director of human resources oversees the
9 department of personnel.

10 Q. Thank you for clarifying that.

11 So let's assume I'm mad and I got this secretary.
12 She keeps coming in late. I'm like, this is ridiculous.

13 Can I go to personnel and say, listen, we need to
14 put this person on more progressive monitoring to
15 correct their issues?

16 A. Yes.

17 Q. And so, that program would be called what?

18 A. It's still the attendance control program.

19 Q. But what would you call it? If you were actively
20 monitoring someone for tardiness, what would you call
21 it?

22 A. We actively monitor everyone for tardiness. It's
23 just that, when it gets to a threshold of a point where

1 you want to go through the progressive steps of the
2 informal counseling and then on to formal counseling and
3 then to a recommendation for a notice of discipline for
4 permanent employees, then that's where we would then
5 begin having those conversations of beginning the
6 informal counseling process.

7 Q. And so, the informal counseling process would
8 involve some sort of monitoring for tardiness as part of
9 it.

10 A. Yeah. The supervisor would continue to monitor
11 the tardiness and see if there's been a correction in
12 the behavior. And if not, it could progress further.

13 Q. And so, this is a written directive from the
14 Department of Corrections addressing this attendance
15 control program, right?

16 A. There's a directive on the attendance control
17 program.

18 Q. What's the directive number?

19 A. I believe it's 2202.

20 Q. I see you have some materials with you today.

21 Do you have a copy of that directive with you?

22 A. No.

23 Q. We're trying to figure out what I have and what I

1 don't have. And I may not have this directive 2202. So
2 I would ask now in the context of this deposition for
3 you to produce that to Ms. Rubinstein so she
4 can send it to me so I can take a look at it.

5 But it's fair to say, if you have an employee
6 who's tardy on a regular basis, you have steps that you
7 can use to address that, right?

8 A. Correct.

9 Q. And that's short of, say, terminating someone's
10 employment.

11 A. Yes.

12 Q. That directive about time and attendance requires
13 progressive discipline, doesn't it?

14 A. Again, it doesn't give steps on tardiness. It
15 doesn't tell you -- because, depending on the nature of
16 the job, you could not do an informal counseling and you
17 could invoke other actions, depending on the totality of
18 the circumstances.

19 Q. In general, that would involve COs that are late
20 and there are problems with shift changes and the like
21 caused by CO tardiness. We can agree about that.

22 That's a serious issue, isn't it?

23 MS. RUBINSTEIN: Objection.

1 THE WITNESS: It's not the only one,
2 though.

3 MR. KEACH: I'm sorry.

4 THE WITNESS: That wouldn't be the only
5 situation.

6 BY MR. KEACH:

7 Q. Well, I'm trying to figure out, like, okay, if
8 someone works in central office and they're late a
9 handful of times five minutes, is that the type of
10 serious situation that would warrant more direct action,
11 or is that something that would be considered a minor
12 violation and would be subject to more progressive
13 steps?

14 A. It would depend on the totality of what was going
15 on those particular days that they were late.

16 Q. Now, you agree with me that the Department of
17 Correctional Services employs progressive discipline,
18 doesn't it?

19 A. Yes.

20 Q. And that that's something that's supposed to be
21 employed by supervisors in the Department of
22 Corrections.

23 A. Yes. Counseling is not discipline.

1 Q. I understand. Well, when I talk about
2 progressive discipline, you would agree with me that
3 counseling would be a form of discipline, but it's not
4 formal discipline.

5 A. No.

6 Q. Well, what would you describe it, then?

7 This is my understanding how it works in the
8 Department of Corrections, if someone is having a
9 problem. We start off with informal counseling, words
10 or substance, listen, you're screwing up, get your act
11 together. Then we go to formal counseling, a write-up
12 that goes in their file for a period of time. Then we
13 would go to a notice of discipline and then even
14 potentially to a suspension without pay pending the
15 resolution of discipline issues.

16 Does that sound about right?

17 A. You do not necessarily have to have counseling to
18 get to a notice of discipline. And counseling is not
19 discipline.

20 Q. I understand. But is that what you would
21 describe as progressive discipline, or what term would
22 you use so you and I can use the same term of art this
23 afternoon?

1 A. That would be a progressive process that
2 eventually could culminate in discipline.

3 Q. Now, would you agree with me that the directives
4 of the Department of Corrections established the rules
5 by which corrections officers -- or corrections
6 employees should conduct themselves?

7 A. Yes.

8 Q. And you would agree with me that those directives
9 aren't optional; those directives are mandatory, are
10 they not?

11 A. Correct.

12 Q. How did you first learn about Mrs. Trostle's
13 situation? Let me step back.

14 When did you first learn about an effort by
15 Mrs. Trostle's supervisors to demote her from her
16 position in the office of classification and movement?

17 A. I don't know the specific date and time.

18 Q. Well, how were you notified about a concern about
19 Mrs. Trostle?

20 A. I received a memorandum from Douglas Botsford,
21 the director of classification and movement, relative to
22 Mrs. Trostle.

23 Q. I'm going to show you a document we previously

1 marked in this case as Plaintiff's Exhibit 1. Have you
2 take a look at it.

3 A. Okay.

4 Q. Is that the memo that you're referring to that
5 you received from Douglas Botsford?

6 A. Yes.

7 Q. Did anybody from the office of classification and
8 movement contact you about those issues before that
9 memoranda was sent?

10 A. Not that I recall.

11 Q. Did Theresa Knapp-David ever contact you about
12 those issues before that memorandum was sent?

13 A. Not that I recall.

14 Q. So, I just want to follow up here. And let's go
15 through this a little bit.

16 In the course of that memorandum, Mr. Botsford
17 indicated to you that Mrs. Trostle had made an
18 inordinate amount of personal phone calls. You agree
19 with me that it states that.

20 A. I don't know that it states that verbatim, but
21 yes, that --

22 Q. Says that in words or substance, doesn't it?

23 A. Yes.

1 Q. She made too many personal phone calls on the
2 job, right?

3 A. Correct.

4 Q. Now, isn't there a policy and procedure of the
5 Department of Corrections as it relates to the use of
6 state telephones to make personal calls?

7 A. Yes.

8 Q. And what's your understanding of that policy and
9 procedure?

10 A. That state phones are to be limited to state
11 purposes, but when there comes an instance where a
12 personal call is necessary, we do issue employees their
13 phone record to go over and pay for personal calls.

14 Q. Aren't those phones only supposed to be used for
15 phone calls in emergency situations?

16 MS. RUBINSTEIN: Objection.

17 THE WITNESS: The policy may say that.

18 BY MR. KEACH:

19 Q. I'll show you the policy. I don't want to be
20 unfair. Let's take a look at this. It's in Plaintiffs
21 Exhibit 3, which is the directive entitled
22 "State-Furnished Telephone Equipment and Services."

23 A. I have the document, but if you want to ask me a

1 question, I may have to read it longer.

2 Q. Yeah. Sure. Well, I'm just going to direct you
3 to the first page and not the page you're looking at.

4 And it says there that state phones are only
5 supposed to be used in emergency circumstances only with
6 the approval of a supervisor, doesn't it?

7 A. It does.

8 Q. And so, I guess we can agree that that directive
9 establishes the rules by which employees of the
10 Department of Corrections should follow if they're going
11 to use the state telephones for personal reasons,
12 correct?

13 MS. RUBINSTEIN: Objection.

14 THE WITNESS: This and the employees'
15 manual.

16 BY MR. KEACH:

17 Q. Well, is there anything in the employees' manual
18 that talks about the use of state phones?

19 A. Yes.

20 Q. What does it say? I'm not sure I have the
21 employees' manual.

22 A. Well, this quotes 5.6 of the employees' manual,
23 so I assume it says that, but I don't have it, either.

1 Q. So, 5.6 of the employees manual.

2 Would you agree with me that a directive on an
3 issue issued by the Department of Corrections would
4 generally mirror the employee manual?

5 A. They should.

6 Q. Maybe not always, and we'll try to figure that
7 out here.

8 So, here's what I'm trying to figure out: At the
9 time that you got this memo from Mr. Botsford, do you
10 know what the policies and procedures were of the office
11 of classification and movement for the use of state
12 telephones to make personal calls?

13 A. I do not.

14 Q. Were you aware when you received this memo that
15 Theresa Knapp-David, the associate commissioner,
16 routinely made telephone calls off of her state-issued
17 cell phone for personal reasons?

18 A. I'm not.

19 Q. Were you aware that she routinely used her
20 landline to make personal calls?

21 A. I'm not.

22 Q. Were you aware that Mr. Botsford did the same
23 thing as it relates to his landline?

1 A. I'm not.

2 Q. Are you aware that a number of different
3 individuals in the office of classification and movement
4 routinely used their telephones to make personal phone
5 calls?

6 A. I'm not.

7 Q. And we have a series of these documents, and I'm
8 not going to bore you with reviewing the whole stack.
9 I'm going to show you Plaintiff's Exhibit 2, and ask if
10 you've ever seen a document like that before today.

11 A. Yes, I have.

12 Q. In what capacity have you seen that document?

13 A. I want to say that I saw this document as a
14 review of the provisional removal of Ms. Trostle.

15 Q. Well, we'll get back to that document. When you
16 received this memo about Mrs. Trostle's employment, what
17 did you -- how did you respond when you saw that?

18 A. It was forwarded to the appropriate unit within
19 the bureau of personnel to be in processing.

20 Q. So that's where it went first before you saw it,
21 or it came to you and then you directed it to someone
22 for processing.

23 A. I believe that it came to me first, and I

1 directed it through the review process.

2 Q. And so, what is the review process?

3 A. The review process is where bureau of personal is
4 broken up into several different units within the
5 bureau. So the appropriate unit who does the personnel
6 management of that particular unit and/or facility would
7 receive the request for demotion and/or termination,
8 whichever was applicable.

9 They would review the request and any supporting
10 documentation and prepare what we call a termination
11 log. And that could start with a senior personnel
12 administrator or, in the instance of the central office,
13 some units are assigned directly to an associate
14 personnel administrator.

15 Q. And so, who did you send this to for review,
16 meaning this memo?

17 A. The assistant director of personnel for central
18 office at that time would have been -- it would have
19 been assigned to that unit.

20 Q. Would that have been Ms. Ayotte, do you know?

21 A. He's not a miss.

22 Q. My apologies. I thought that was a lady. I may
23 be confusing this with another case.

1 But was it sent to someone by the name of Ayotte
2 to review?

3 A. No.

4 Q. So, who was it sent to for review?

5 A. The assistant director of personnel for that area
6 at the time would have been Carol McCowski.

7 Q. And so, what would the review process entail as
8 it relates to Ms. McCowski's role in this?

9 A. It would be assigned to either the associate
10 senior personnel administrator or the senior personnel
11 administrator, who had oversight of personnel activities
12 for that particular unit, to prepare a termination log
13 sheet. They would review the packet of information, ask
14 any questions that they may have relative to the packet
15 or request, and prepare a termination log, for which
16 they would sign, and move on to the next level of
17 supervision within their chain of command.

18 Q. And so, did that happen here?

19 A. Yes.

20 Q. And so, who would the next person be in the chain
21 of command after Ms. McCowski?

22 A. Ms. McCowski wouldn't have been the associate
23 personnel administrator. She would have been the

1 assistant director. So typically it would have went
2 from the associate personnel administrator to the
3 assistant director, which would have been Ms. McCowski,
4 unless, of course, she was out of the office or on
5 vacation. And then it may be assigned to a different
6 assistant director.

7 Q. So do you know whether or not Ms. McCowski was
8 involved in this process or not?

9 A. She did not sign the term log, but I don't know
10 if she was consulted.

11 Q. Who signed the term log?

12 A. That would be Mr. Ayotte.

13 Q. And he was what, he was the associate -- he was
14 the assistant director?

15 A. Yeah. There's many assistant directors within
16 the bureau.

17 Q. So, is he the one who started the review process?

18 A. He was the second person to review after the
19 associate personnel administrator.

20 Q. So, who is the associate personnel administrator?

21 It says here Jean Daniels. Did Jean Daniels
22 review this?

23 A. Yeah. Her signature should be on the term.

1 Q. It is.

2 So when you say the termination log, are you
3 referring to a document referred to as a termination
4 request?

5 A. If you could show me the form.

6 Q. I'm happy to. Plaintiff's Exhibit 4, it's
7 entitled "Termination Request."

8 A. Yes.

9 Q. So who prepares the termination request?

10 A. In that case Ms. Daniels would have prepared it.

11 Can I see that again, just to verify that that's
12 her name.

13 Q. Sure. It is. It says Jean Daniels on it.

14 A. Yeah.

15 Q. And so, she prepares this, and then she sends it
16 on to Mr. Ayotte, and then it goes to you.

17 A. Correct.

18 Q. So, that third line there took me a while to
19 figure out because I thought that was an R. But that's
20 your signature, Daniel Martuscello --

21 A. The third.

22 Q. -- on the third line down.

23 A. That's me.

1 Q. And then it was also reviewed by whom in
2 diversity management?

3 A. Well, that says Deborah Nielson, who is the
4 director of our office of diversity management, but
5 there are initials after that. It looks like someone
6 signed on her behalf.

7 Q. Do you know who that is?

8 A. With certainty, no.

9 Q. Well, let's keep going forward here.

10 Do you agree with me in your capacity as director
11 of human resources that everyone should be treated the
12 same, shouldn't they?

13 A. Correct.

14 Q. That all employees, if they break the rules,
15 should be treated the same; fair to say? Obviously it
16 depends on the individual circumstances.

17 A. Mitigating and aggravating circumstances.

18 Q. But there's a need in a large organization like
19 the Department of Corrections to show that there would
20 be objective application of discipline to employees who
21 violate the rules.

22 Can we agree on that?

23 MS. RUBINSTEIN: Objection.

1 THE WITNESS: The same outcomes may not
2 come, depending on the nature of the
3 specific incidents. There's so many
4 variations. But on a broad, sweeping
5 statement, yes, we should apply discipline
6 routinely.

7 BY MR. KEACH:

8 Q. Evenhandedly, correct?

9 A. Correct.

10 Q. Now, I want to start off and talk to you a little
11 bit about these phone calls that Mrs. Trostle is alleged
12 to have placed.

13 Any point in time prior to you signing the
14 termination letter for Ms. Trostle on June 20th, 2011,
15 did you learn that these telephone rules were not being
16 uniformly applied in the office of classification and
17 movement?

18 MS. RUBINSTEIN: Objection.

19 THE WITNESS: I don't understand your
20 question.

21 BY MR. KEACH:

22 Q. Sure. We've established already in testimony in
23 this case that Knapp-David, Ms. Knapp-David, routinely

1 used her state-issued telephone in violation of state
2 directives, that Douglas Botsford routinely used his
3 state-issued telephone in violation of state directives,
4 and that all of the employees of the office of
5 classification and movement routinely used their
6 state-issued telephones in violation of state
7 directives.

8 Did you learn that before you signed
9 Ms. Trostle's termination letter on June 20th, 2011?

10 MS. RUBINSTEIN: Objection.

11 THE WITNESS: We have a practice in
12 central office whereby the central office
13 Division of Budget and Finance on a monthly
14 basis issues bills with a memorandum for
15 staff to pay for personal phone calls, which
16 is what this document reflects, of who paid
17 what.

18 So, to the extent that I received a
19 bill myself and that I saw this document, to
20 that extent, I see that there was personal
21 use of phone calls which were paid for in
22 accordance with department practice.

23 BY MR. KEACH:

1 Q. Well, let's assume that I work in your department
2 and I need to figure out how to conform my conduct to
3 make sure that I'm going to follow the practice.

4 Where would I look?

5 A. You would look at the directive and also, when
6 you're issued the memorandum to review the phone logs,
7 if there was any payment that was outside of the norms,
8 the supervisor has a chance to review and signs off on
9 that.

10 Q. Again, here's what I'm trying to figure out. I
11 see a woman who lost her job, who got demoted, who lost
12 \$20,000 in pay, and had some pretty substantial
13 psychological problems after this event occurred.

14 And so, I'm trying to figure out, with the
15 benefit of hindsight, where Mrs. Trostle could have
16 looked to figure out that her conduct would have
17 violated department policy to such an extent it would
18 have resulted in that very harsh response?

19 Can you tell me where I can look to determine
20 this informal practice that you talked about and how one
21 could conform their conduct to avoid coming afoul of it,
22 which would result in their demotion?

23 MS. RUBINSTEIN: Objection.

1 THE WITNESS: We already talked about
2 the directive of telephone use and I've also
3 referenced the memorandum that's issued with
4 each phone bill to the employees, which
5 outlines and provides them with direction
6 for them to review the phone bill and
7 indicate which were personal and pay for
8 personal calls.

9 So in those two instances -- and
10 regardless of having personal calls, as long
11 as you have a phone on your desk assigned to
12 you, that memo would be generated to you
13 each and every month.

14 BY MR. KEACH:

15 Q. So, that memo comes to you. And let's assume
16 that you had to call your kid because you have a sick
17 kid at school or you had some emergency situation come
18 up. I can understand that, but how would someone be
19 able to determine what level of personal phone calls
20 would be appropriate besides making emergency calls?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: Part of that review
23 process where they identify what calls are

1 there and they pay for the calls, it
2 requires the employee to write out how much
3 they owe and to turn it in to the
4 supervisor, at which point the supervisor
5 could then conduct a review, if there are
6 calls that are outside of what would be
7 acceptable boundaries, the supervisor could
8 then address the conduct. And that way the
9 behavior can be corrected.

10 BY MR. KEACH:

11 Q. Well, I just want to be clear. The directive
12 says no personal phone calls except for emergency
13 purposes. And then every month you get a memo that's
14 sent out that says, review your phone bill to see if
15 you're making personal phone calls on state time on
16 state equipment.

17 What is there beyond that?

18 MS. RUBINSTEIN: Objection.

19 MR. KEACH: That I can look to.

20 THE WITNESS: I just answered that.

21 BY MR. KEACH:

22 Q. There's nothing, fair to say, besides those two
23 things?

1 A. Again, so those two things, and then in
2 correspondence with when your supervisor reviews what
3 you're paying for, would initiate a discussion.

4 Q. Well, let's just clear the air here.

5 Absent emergency circumstances, should you be
6 making personal phone calls while you're on state time
7 doing state business, yes or no?

8 MS. RUBINSTEIN: Objection.

9 THE WITNESS: The directive does not
10 call for it.

11 BY MR. KEACH:

12 Q. The directive doesn't allow for it, does it?

13 A. No.

14 Q. In fact, that would be to some extent, if you're
15 claiming you're working and, in fact, you're doing
16 personal things that don't involve the interest of the
17 taxpayers, that would be inappropriate, wouldn't it?

18 MS. RUBINSTEIN: Objection.

19 THE WITNESS: Depends on the extent to
20 which you're doing it.

21 BY MR. KEACH:

22 Q. Well, let's take that one step further. There's
23 this -- and I want the record to reflect that when

1 Mr. Botsford was here, I offered to give the state \$7 to
2 pay for Mrs. Trostle's phone calls, and he declined.

3 But regardless, would someone making \$7 of
4 personal phone calls on state equipment in 14 months
5 rise to the level where it would cause you concern?

6 That's 50 cents of phone calls a month.

7 MS. RUBINSTEIN: Objection.

8 THE WITNESS: It was the totality of
9 the circumstance that led to my
10 determination.

11 BY MR. KEACH:

12 Q. Well, we're going to walk through each part of
13 that. So, I'm asking you -- let's step back.

14 Do you make personal phone calls --

15 A. I do.

16 Q. Well, let me finish.

17 Do you make personal phone calls on your
18 state-issued telephone?

19 A. I do.

20 Q. Do you review your bill every month?

21 A. I do.

22 Q. Have you made more than 50 cents of phone calls
23 in a month?

1 A. Not routinely.

2 Q. Have you done it?

3 A. No.

4 Q. You've never made more than 50 cents of personal
5 phone calls off your state-issued phone.

6 A. I don't believe so.

7 Q. Well, you can agree with me, by looking through
8 that list, that there are plenty of people -- and this
9 is just for one month, January of 2010 -- there are
10 plenty of people on there who made more than 50 cents of
11 phone calls off their personal state-issued phone; isn't
12 that right?

13 A. That's correct.

14 Q. Can you pass that over to me.

15 A. Sure.

16 Q. And, in fact, we've got Theresa Knapp-David
17 making a dollar's worth of phone calls in January 2010,
18 don't we?

19 A. That's what's reported.

20 Q. And we've had a whole bunch of other people --
21 there's at least five or six other people on that list
22 that made more than 50 cents worth of phone calls in
23 January 2010; isn't that correct?

1 A. There are other people listed.

2 Q. That made more than 50 cents in calls.

3 A. That made more than 50 cents.

4 Q. Well, here's what I'm trying to figure out: Was
5 any effort made by anyone in your department to
6 determine how Mrs. Trostle's phone call activity
7 compared to others in her same unit?

8 A. Not that I'm aware of.

9 Q. And do you know whether anyone else's phone calls
10 were audited, like Mrs. Trostle's were by Mr. Botsford
11 to determine whether or not she was making personal
12 phone calls on state equipment?

13 MS. RUBINSTEIN: Objection.

14 THE WITNESS: I don't know.

15 BY MR. KEACH:

16 Q. Well, I'm asking you: Do you know --

17 A. I said I don't know.

18 Q. -- as you sit here today, whether anyone else had
19 their phone calls audited, or was it just Mrs. Trostle?

20 MS. RUBINSTEIN: Objection.

21 THE WITNESS: I don't know.

22 BY MR. KEACH:

23 Q. I can tell you the undisputed proof in the case.

1 MS. RUBINSTEIN: We're not answering
2 questions, Mr. Keach. We're asking
3 questions.

4 MR. KEACH: I'm going to conduct my
5 examination how I see fit and have a right
6 to build a foundation to ask further
7 questions. You have the right to object to
8 the form of the question.

9 BY MR. KEACH:

10 Q. Now, it's undisputed -- Mr. Botsford admitted in
11 his deposition -- that the only person he looked at to
12 see whether or not they were making these personal phone
13 calls on state equipment was Melissa Trostle. And he
14 didn't look at anyone else until after Ms. Trostle was
15 already demoted and was back in Greene Correctional
16 Facility.

17 So with that premise, sir, does that cause you
18 any concern that only Ms. Trostle was targeted in this
19 way?

20 MS. RUBINSTEIN: Objection.

21 THE WITNESS: When the employee signs
22 this document, he has the ability to look at
23 the phone record as they're signing this

1 document so that would give him a chance to
2 review all of these people that had
3 indicated a personal phone call for
4 utilization.

5 BY MR. KEACH:

6 Q. You didn't answer my question.

7 Does it cause you concern that only Mrs. Trostle
8 had her phone records pulled and went through as a part
9 of the process versus having everyone's records
10 considered?

11 MS. RUBINSTEIN: Objection.

12 THE WITNESS: Well, again, based on the
13 totality of what I know, and that people
14 were admitting to utilizing the phone, and
15 that the director would have had the
16 opportunity to review those calls, and that
17 Mrs. Trostle was not indicating any personal
18 calls, that he did a further review of
19 Mrs. Trostle, that does not cause me
20 concern.

21 BY MR. KEACH:

22 Q. That does not cause you concern.

23 Well, do you know whether or not in the past

1 Mrs. Trostle had paid for her phone calls?

2 A. I believe, as part of the period of times that
3 were reviewed, that she had no indication of submitting
4 documentation indicating that she had used her phone.

5 Q. Do you know whether or not that she was actually
6 provided with those bills to review?

7 A. My understanding is that each of the units
8 provided all of their employees with their bills to
9 review.

10 Q. And I just want you to assume for a second, sir,
11 let's assume that someone had a personal grudge against
12 Mrs. Trostle and decided not to give her these bills to
13 review every month and so she didn't have an opportunity
14 to review these bills.

15 Would that cause you some concern?

16 A. Yes.

17 Q. You never bothered to determine whether or not
18 Mrs. Trostle was given an opportunity to review these
19 bills before you terminated her, did you?

20 A. I had reason to believe that all employees are
21 provided the bills in accordance with the memorandum.

22 Q. So your answer is no, you didn't determine
23 whether or not Ms. Trostle was provided with an

1 opportunity to review these bills before you terminated
2 her, correct?

3 MS. RUBINSTEIN: Objection.

4 THE WITNESS: It was my belief that she
5 had reviewed the bills and had not indicated
6 personal utilization.

7 BY MR. KEACH:

8 Q. So, your answer is no, you did not check that
9 yourself, did you?

10 A. No.

11 Q. And no one below you checked that, either, in
12 terms of under your supervision as director of human
13 rights.

14 MS. RUBINSTEIN: Objection.

15 THE WITNESS: I don't know.

16 BY MR. KEACH:

17 Q. Now, my understanding is that it's -- that
18 there's a policy and procedure in the Department of
19 Corrections that the first step that a supervisor should
20 take when they have a concern about an employee's
21 conduct is at least to sit down with that employee and
22 allow them to explain themselves.

23 Am I right about that?

1 MS. RUBINSTEIN: Objection.

2 THE WITNESS: It depends on the
3 totality of the situation.

4 BY MR. KEACH:

5 Q. How does it depend on the totality of the
6 situation?

7 A. Well, I can give you umpteen scenarios.

8 Q. Well, I'll try to give a couple, and let's see if
9 you agree with me.

10 You and I would agree, if a correction officer
11 gets caught having sexual relations with an inmate,
12 they're not going to get an opportunity to explain
13 themselves; they're going to be removed from the
14 facility; fait to say?

15 A. Agreed.

16 Q. If an employee commits a crime, for instance, say
17 that they're caught bringing in heroin, they're not
18 going to be given an opportunity to explain themselves;
19 they're going to be removed from the facility, correct?

20 A. Agreed.

21 Q. So, give me some other less severe examples.

22 Apart from criminal conduct on the job, when is
23 an employee not going to be given an opportunity to

1 explain themselves or at least explain their situation?

2 MS. RUBINSTEIN: Objection.

3 THE WITNESS: When we have the facts
4 surrounding the situation and we don't need
5 to request anything further of the employee.

6 BY MR. KEACH:

7 Q. And is that the case here, that you didn't need
8 to request anything further from Ms. Trostle, that you
9 felt that you had the facts?

10 A. I felt I had sufficient facts as reported to my
11 office to proceed with my determination to remove her
12 from her provisional position as assistant director.
13 Yes.

14 Q. Is that what's required by the state's directive
15 on using state equipment for phone calls?

16 MS. RUBINSTEIN: Objection.

17 THE WITNESS: I don't understand the
18 question.

19 BY MR. KEACH:

20 Q. That's what's allowed under the state's policies
21 for the use of phone calls is that the employee isn't
22 even to be consulted.

23 A. Provisional employees have no rights. They can

1 be removed from the position for no reason or reason.

2 Q. Okay.

3 A. That's the state policy.

4 Q. And what if an employee is removed from her
5 provisional position for an impermissible reason under
6 federal law, that would change your opinion, wouldn't
7 it?

8 MS. RUBINSTEIN: Objection.

9 THE WITNESS: Yeah. Any violations of
10 law would be problematic.

11 BY MR. KEACH:

12 Q. If an employee was eliminated from her position
13 because she complained about racial discrimination in
14 the workplace, that would change your analysis about
15 whether or not that provisional employee's termination
16 was justified, wouldn't it?

17 MS. RUBINSTEIN: Objection.

18 THE WITNESS: Yes. That was not my
19 determination, though, on that basis.

20 BY MR. KEACH:

21 Q. Well, if an employee was terminated from their
22 employment because they took family medical leave, that
23 would also be problematic, wouldn't it?

1 A. Yes. We have a directive on family medical
2 leave.

3 Q. So, are you aware that this memo that you were
4 sent by Mr. Botsford was the day after Mrs. Trostle had
5 to leave the office for family medical leave?

6 A. I don't recall that.

7 Q. Well, I'm telling you as a matter of fact that
8 that memo was prepared the day after Mrs. Trostle -- or
9 at least in the immediate proximity after Mrs. Trostle
10 had to leave the office for family medical leave to have
11 an emergency medical procedure.

12 A. She had approved family Medical Leave Act under
13 the...

14 Q. It is my understanding that she had to go on
15 family medical leave. There was an emergency situation.
16 So that's different.

17 A. FMLA is not necessarily just because you have a
18 family emergency or a personal emergency, medical.

19 Q. I understand. She had to have an emergency
20 medical procedure and left the office to go attend to
21 that.

22 A. That's not necessarily Family Medical Leave Act.

23 Q. Well, let's just take this one step further.

1 You would agree with me, under the Family Medical
2 Leave Act, that if an employee has to take an extended
3 absence because of an emergency medical situation, they
4 can do so and then apply for family medical leave later;
5 isn't that right?

6 A. Yes. The department has a policy in which, after
7 three days of absence, we pre-designate. And then the
8 employee is required to fill out the DOL form and
9 submission, and it must be filled out in its entirety.
10 And it's reviewed and approved for Family Medical Leave
11 Act, and then you get 12 weeks of FMLA leave per
12 calendar year, depending on if you meet all of the
13 requirements of 1250 hours worked in the previous year.

14 Q. And so, do you know whether or not Mrs. Trostle
15 filled out those forms to apply for family medical leave
16 after she had to leave and have surgery on her kidneys?

17 A. I don't know.

18 Q. But you would agree with me that, if she properly
19 applied for family medical leave and -- or was eligible
20 for -- was appropriately eligible for family medical
21 leave and then was terminated as a result of taking
22 family medical leave, that that would be problematic,
23 even if she was a provisional employee.

1 A. Yes.

2 Q. You claim you had all the facts that you needed,
3 right?

4 A. Based on the facts that I had, I had sufficient
5 belief to render my decision.

6 Q. Is it impermissible if someone uses their lunch
7 hour to make personal phone calls?

8 A. I don't know.

9 Q. The time that the state gives them for lunch, if
10 they're at their desk eating their lunch and they make
11 some calls, is that improper?

12 A. No.

13 Q. And so, can you tell me whether these personal
14 phone calls that Mrs. Trostle made, the \$7 worth of
15 personal phone calls that justified her demotion, were
16 made at any point in time during the time that she
17 scheduled for her lunch break?

18 MS. RUBINSTEIN: Objection.

19 THE WITNESS: I'm not aware.

20 BY MR. KEACH:

21 Q. So, that's not something you looked in to; fair
22 to say?

23 A. There were the phone logs that were also attached

1 as supporting documentation which would have given the
2 times, but I can't recall that I was looking to that
3 detail.

4 Q. Well, here's what I'm trying to figure out.
5 Let's assume that all \$7 of Mrs. Trostle's personal
6 phone calls made over the course of 14 months were made
7 on her lunch hour.

8 That wouldn't be inappropriate, would it?

9 A. Not if she was reimbursing us.

10 Q. And assuming that she was given the chance to,
11 right, that was the assumption you made?

12 A. Correct.

13 Q. So, how about after hours, let's say you work
14 8:30 to 4:30. 4:30 rolls around. You got to place a
15 couple of personal phone calls before you go home.

16 According to your understanding of how things
17 were done at central office, that wouldn't be
18 inappropriate, either, as long as an opportunity was
19 given for someone to be able to reimburse the calls.

20 A. I don't know why you would be there after hours,
21 unless you were actually working. She's an MC employee.
22 So, you work the hours until the job is done. And if
23 you're eligible for overtime, you're paid overtime. And

1 if you're not, you're not eligible for overtime.

2 Q. I understand, but I'm just asking. It's 4:30.
3 I'm trying to make plane reservations to go somewhere.
4 And so, I pick up the phone and call somebody.

5 Is that inappropriate?

6 A. It happens. According to the directive it might
7 be, but it happens.

8 Q. So that wouldn't be inappropriate, either.

9 Here's what I'm trying to figure out. You know,
10 you're the director of human resources for the entire
11 Department of Correctional Services. What do you guys
12 have, like, 50-, 60,000 employees? Am I right about
13 that -- or is it 28,000?

14 A. About 29-.

15 Q. 29,000 employees and about 75,000 inmates; is
16 that accurate?

17 A. No.

18 Q. How many inmates do you have?

19 A. 54,000.

20 Q. I think the numbers may have gone down.

21 A. 1999 was the high.

22 Q. You have 29,000 employees, and you're the guy
23 that's the director of human resources for all of them,

1 but your sphere is mainly the people that aren't
2 protected by civil service issues; fair to say?

3 MS. RUBINSTEIN: Objection.

4 THE WITNESS: That are not subject to
5 discipline under 75.

6 BY MR. KEACH:

7 Q. What would the harm have been for you to sit down
8 with Mrs. Trostle when she got back from her surgery and
9 ask her to explain herself before you made a decision?

10 MS. RUBINSTEIN: Objection.

11 THE WITNESS: I had sufficient belief
12 that, based on the evidence I had before me,
13 that that wasn't necessary, and that I don't
14 afford that opportunity to employees on a
15 statewide basis.

16 Supervisors submit documentation to
17 support the recommendation for termination,
18 and I make the terminations. Not to say
19 that it couldn't have been done, but I
20 didn't have any reason to believe that that
21 was necessary.

22 BY MR. KEACH:

23 Q. How many other people have you demoted or

1 terminated from their employment with the State of New
2 York for making phone calls off state equipment?

3 A. You're assuming that that was the underlying --
4 the only fact of why she was demoted, just for the phone
5 calls.

6 Q. Well, we'll get to the other reasons in a minute,
7 but I believe it was either Ms. Knapp-David or
8 Mr. Botsford detailed to me in his testimony that the
9 overriding reason was the phone calls.

10 But regardless, let's start with this: How many
11 other people have had their phone calls on state-issued
12 equipment be one of the reasons in a totality of the
13 circumstances that they were either demoted or fired
14 from state employment?

15 A. I can't answer that. I don't know.

16 Q. But is it fair to assume the answer would be
17 none?

18 MS. RUBINSTEIN: Objection.

19 THE WITNESS: I don't know.

20 BY MR. KEACH:

21 Q. And you sign all these memos, right? The buck
22 stops on your desk to determine whether or not one of
23 these probationary, these non-civil service protected

1 employees lose their job, the buck stops on your desk
2 when you were the director of human resources, right?

3 A. Correct.

4 Q. I'm asking you to detail to me one person who
5 lost their job with the State of New York because of a
6 claim that they misused state equipment as part of the
7 totality of the circumstances of the termination, one
8 person. Give me one name.

9 A. I've terminated people for misuse of state
10 equipment. I can't give you a name for any of these
11 people.

12 Q. Phones.

13 A. You said state equipment.

14 Q. Phones, state phones.

15 A. I don't recall any phones.

16 Q. The other occasions when you terminated someone
17 for misusing state equipment, that would be someone who,
18 say, uses a gas card and misuses a gas card and filled
19 their car up with state gas. Is that an example?

20 A. Could be.

21 Q. Or uses a state car at a correctional facility
22 for personal reasons.

23 A. Could be.

1 Q. Can you give me some other examples of people who
2 used state equipment and that led to their either
3 demotion or termination from employment.

4 A. Offhand, I can't really name anything for you.

5 Q. So, the examples I gave would be a typical
6 example of a situation where someone misusing state
7 equipment could be terminated or demoted; fair to say?

8 A. I couldn't say typical, but I would say they
9 could be examples. Yes.

10 Q. So, you can't name anybody that misused the
11 phones and that resulted in their termination from
12 employment, right, or demotion?

13 A. Not offhand.

14 Q. So now, do you know whether other employees that
15 were employed in the office of classification and
16 movement, whether or not they also committed the same
17 sorts of actions Mrs. Trostle did in making phone calls
18 that they didn't reimburse?

19 MS. RUBINSTEIN: Objection.

20 THE WITNESS: I don't know that.

21 BY MR. KEACH:

22 Q. Wasn't that something that, again, if you're
23 going to take this sort of harsh action against one

1 person, shouldn't everyone have the same sort of
2 evaluation?

3 A. I evaluate things that are referred to my office.
4 I can't do a statewide evaluation on every -- all 29,000
5 employees to determine if any employee is also under
6 this type of infraction. I take the recommendation as
7 it comes to me, and I look at the facts and
8 circumstances.

9 Q. How far is your office from the office of
10 classification and movement?

11 A. It's two floors away.

12 Q. You're in the same building.

13 A. Yes.

14 Q. You're over here at the Harriman campus.

15 A. Correct.

16 Q. And so, I understand you can't do an audit of all
17 28,000 employees, I'm not suggesting you should do that,
18 but I'm trying to figure out in this office,
19 classification and movement, wouldn't it have been
20 appropriate, if we're going to discipline one person for
21 something, we should discipline everybody?

22 A. I didn't discipline Ms. Trostle.

23 Q. What did you do?

1 A. I removed her from her provisional status.

2 Q. So I've had this discussion before. You're
3 telling me that someone losing \$20,000 in pay and being
4 removed in a central office and sent back to a
5 correctional facility wouldn't be considered discipline.

6 A. It's not discipline.

7 Q. Would you consider that a demotion?

8 A. It was a demotion. It's not discipline.

9 Q. Fine. So if you're going to demote somebody
10 based on the use of state phones, wouldn't it be fair to
11 see if anyone else was engaged in the same sort of
12 conduct?

13 MS. RUBINSTEIN: Objection.

14 THE WITNESS: Again, I already answered
15 that for you.

16 BY MR. KEACH:

17 Q. You gave what, just that it was referred to you
18 and you don't look any further?

19 A. Yeah. I'm not going to go check 28,000
20 employees --

21 Q. I'm taking about --

22 A. I know, but to segregate a population of 28,000
23 employees, to follow your train of thought, would be

1 that I should check it all, and it would be unfair to
2 only check one segregation of a population.

3 Q. Well, here's what I'm trying to figure out, sir:
4 Wouldn't it cause you concern from the position of a
5 person who is trying to have an even-handed application
6 of rules in the state government that one person was set
7 aside for a level of scrutiny that wasn't applied to
8 anybody else?

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: For the duration of time
11 spent on the phone as outlined on the phone
12 records themselves, the duration of time,
13 coupled with -- coupled with the
14 non-reporting of personal use of the phone
15 in accordance with the department practice,
16 that gives me great concern.

17 BY MR. KEACH:

18 Q. The duration of time on the phone.

19 A. That, coupled with a non-reporting.

20 Q. My understanding is that Mrs. Trostle works seven
21 and a half hours a day; is that right?

22 A. That doesn't include her lunch.

23 Q. No, no, no. If she works from 8:30 to 4:30 and

1 then she gets a half an hour lunch, that's unpaid,
2 right?

3 Isn't that how it works?

4 A. That's correct.

5 Q. So, she works 7.5 hours a day times 60 minutes in
6 an hour, so she works 450 minutes a day.

7 A. Is that what it says?

8 Q. No. It's just what I added up. I multiplied 60
9 times 7.5 hours. So that's 450 minutes a day. And we
10 multiply that by five days in a week. So, that equals
11 2250 minutes working a week. And we'll just say she
12 worked 50 weeks a year, took some vacation time. So, we
13 get to 112,500 minutes of work a year.

14 So now we have 230 minutes of calls, and another
15 five of these were calls that were toll calls,
16 long-distance, personal calls. And we have 500 minutes
17 of calls to 800 numbers. So that adds up to 730 minutes
18 of calls a year.

19 A. A year.

20 Q. In a year, according to this. Well, I gave you
21 the benefit of the doubt because I know she was on
22 family medical leave for part of the time. It says
23 March 2010 to April 2010.

1 A. I don't have the memo, so I'm going off of your
2 finding.

3 Q. Well, that's 14, right? March 2010 to April 2011
4 is 14 months, right?

5 A. 14.

6 Q. Yeah.

7 A. March to April.

8 Q. Yeah. We have two Marches in there. You have
9 the first March and the second March. So, you have 14
10 months. But I'm giving you the benefit of the doubt and
11 the state. 12 months -- we're going to average it out
12 for 12 months instead of 14 because she was out on leave
13 for part of the time. I know she was out for several
14 weeks.

15 So, we got 730 minutes, right? So, I'll tell you
16 what. We're going to do this by days. So, we've got
17 five days of work times 50 days a year equals 250,
18 right? 250 days of work a year. So, if we take 730
19 minutes --

20 A. What was 730 minutes again?

21 Q. From this memo it would be the combination of her
22 230 minutes of personal phone calls over the course of
23 14 months, plus her 500 minutes of toll-free calls over

1 the course of 14 months. That's what the memo says.

2 It says here, because I'll read it to you, "I
3 consider the use of her work phone to such an extent for
4 personal reasons inappropriate. As a manager,
5 Mrs. Trostle cannot function effectively or present a
6 positive example to her subordinates by consuming over
7 700 minutes on personal phone calls and not reimbursing
8 the state for her phone charges," right? That's what it
9 says as a justification.

10 So, according to this, I added it up, 730
11 minutes. You got 250 days in the year or 250 days
12 working in a year. So we'll divide that by 250. 2.92
13 minutes a day on the phone for personal reasons.

14 You can look at me with a straight face across
15 this table and tell me that someone deserves to lose
16 their job and be demoted and sent back to their hold
17 item for making less than three minutes of personal
18 phone calls a day throughout the course of the entire
19 year; is that accurate?

20 MS. RUBINSTEIN: Objection.

21 THE WITNESS: It's a little misleading.

22 MR. KEACH: I'm asking you a question.

23 THE WITNESS: I know. I'm answering.

1 When you look at her actual phone
2 calls, there was periods of time when there
3 were big blocks of 80 minutes at a clip
4 phone calls, not extrapolated out.

5 Yes, that might be the period reviewed,
6 but there are big blocks of 80 minutes, 60
7 minutes, 50 minutes, also. Also, as I
8 indicated to you, it wasn't solely based on
9 the utilization of the phone. It's also the
10 lack of reporting her personal use and the
11 practice of the department. And it's a
12 manager at that level with the combination
13 of the utilization of the phone and the not
14 reporting under department practice, as
15 other employees are doing. So that was the
16 reason why she was demoted.

17 And yes, I feel it's justified.

18 BY MR. KEACH:

19 Q. Okay, great.

20 It says one day there were over 80 minutes of
21 long distance personal calls, March 8, 2011.

22 Do you know what happened on March 8, 2011?

23 A. No.

1 Q. Do you care?

2 MS. RUBINSTEIN: Objection.

3 THE WITNESS: I don't not care.

4 BY MR. KEACH:

5 Q. Well, I mean, if there's a reason why
6 Mrs. Trostle had to make 80 minutes of phone calls that
7 day, wouldn't that factor in to what you're doing here?

8 A. No. Because she didn't report it.

9 Q. How could she report it? She went out on family
10 medical leave a month later.

11 MS. RUBINSTEIN: Objection.

12 THE WITNESS: When the bills came out
13 and they were under review, it wasn't
14 reported.

15 BY MR. KEACH:

16 Q. How long does it take for these bills to go from
17 the office manager of budget, or whatever does it --

18 A. I don't know.

19 Q. -- to get to the employees?

20 A. I don't know.

21 Q. Well, how about you, what's your experience?

22 How long does it take? If you make phone calls
23 in March 2011, when are you going to get that bill?

1 A. Within weeks, maybe a couple weeks, four weeks.
2 I don't know. I don't know when the bills came in. I
3 don't pay that close attention.

4 Q. Well, you would agree with me that that bill
5 would -- if a March 2011 phone call was generated, that
6 the earliest that the bill could be generated for that
7 month would be April 1st, right?

8 A. Presumably.

9 Q. And so, if there's some delay in getting those
10 bills out after April 1st, it would go into May, right?

11 A. Probably not that late, but...

12 Q. But you don't know as it relates to Ms. Trostle;
13 fair to say?

14 A. That's what I'm trying to tell you.

15 Q. And so, do you know, as you sit here today,
16 whether Mrs. Trostle had an opportunity to review her
17 bill for March of 2011 before she went out on medical
18 leave in May of 2011?

19 MS. RUBINSTEIN: Objection.

20 THE WITNESS: I don't know that.

21 BY MR. KEACH:

22 Q. And so, if I told you that Mrs. Trostle's mother
23 become gravely ill on March 8, 2011, and she learned

1 about that while she was at work, wouldn't that affect
2 your opinion about whether or not what Ms. Trostle was
3 doing was appropriate?

4 MS. RUBINSTEIN: Objection.

5 THE WITNESS: For that one particular
6 call.

7 MR. KEACH: Yeah.

8 THE WITNESS: For that one call.

9 BY MR. KEACH:

10 Q. So if she's calling her relatives to try to find
11 out how her mom's doing, that would be okay, wouldn't
12 it?

13 MS. RUBINSTEIN: Objection.

14 THE WITNESS: I would think that that
15 would be okay.

16 BY MR. KEACH:

17 Q. And so, why didn't you ask her before you demoted
18 her?

19 A. I already answered that for you.

20 Q. Well, not really.

21 A. Yeah. I reviewed the totality of the
22 documentation in front of me and made a determination on
23 the demotion.

1 Q. And that documentation doesn't include an
2 opportunity for Mrs. Trostle to come in and explain
3 herself, does it?

4 A. No.

5 Q. And if this would have been civil service
6 situation, Mrs. Trostle would have been given an
7 opportunity to explain herself, wouldn't she?

8 A. What do you mean by civil service?

9 Q. If this was covered under the ordinary discipline
10 that would be applied to someone that worked at the
11 Department of Correctional Services that has civil
12 service protection, that person would have been given an
13 opportunity to explain themselves, wouldn't they?

14 A. At a hearing.

15 Q. Or by filing a grievance, isn't that the first
16 step that you have to take to get a hearing, filing a
17 grievance, right?

18 A. Yes.

19 Q. If you and I can agree that Mrs. Trostle making
20 this particular phone call, these phone calls on one day
21 for 80 minutes, which would have been a third of the
22 total that is part of this \$7 in phone calls, I just
23 can't figure out for the life of me why someone of your

1 experience and intelligence
2 wouldn't demand that she be given an opportunity to
3 explain herself before you sent her back down to her
4 hold item and demoted her and cost her \$20,000 in pay.

5 A. Was there a question?

6 Q. Yeah.

7 A. What was it?

8 Q. Again, why would a man of your intelligence and
9 experience not give this woman an opportunity to explain
10 it?

11 MS. RUBINSTEIN: Objection.

12 THE WITNESS: I reviewed the totality
13 of the records and made a determination.

14 BY MR. KEACH:

15 Q. Why would you not demand that people underneath
16 you and/or the people that were pushing this give her an
17 opportunity to explain herself first?

18 MS. RUBINSTEIN: Objection.

19 THE WITNESS: I was satisfied with what
20 was before me to render a determination.

21 BY MR. KEACH:

22 Q. And giving Mrs. Trostle an opportunity to explain
23 herself wasn't something you felt was necessary for you

1 to make a determination; fair to say?

2 A. Correct.

3 Q. Do you understand that the term "pretext" as it's
4 applied in an employment discrimination case?

5 A. No.

6 Q. You've never learned that term in your years
7 working as a director of human resources for the
8 Department of Correctional Services.

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: If you want to shed light
11 on it, I would listen.

12 BY MR. KEACH:

13 Q. Sure. Pretext is basically where someone has an
14 imperishable reason for doing something that violates
15 the law, but they come up with some other excuse to get
16 rid of the person so that they don't have to tell the
17 real reason why they did it.

18 Did you ever hear that term?

19 MS. RUBINSTEIN: Objection.

20 BY MR. KEACH:

21 Q. Or do you understand it now that I've defined it?

22 A. I understand it.

23 MS. RUBINSTEIN: Objection.

1 BY MR. KEACH:

2 Q. And would it cause you some concern, sir, if
3 Mrs. Trostle was the only member of the office of
4 classification and movement that was of Spanish heritage
5 and she was treated in this way, differently from
6 others?

7 Wouldn't that cause you some concern as the
8 director of human resources?

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: It causes me concern when
11 someone is treated differently based on
12 their Spanish descent. I think that's the
13 term you used.

14 BY MR. KEACH:

15 Q. And would it cause you some concern that that
16 person may have been treated differently because, in the
17 perception of her supervisor, she used too much family
18 medical leave?

19 MS. RUBINSTEIN: Objection.

20 THE WITNESS: Yes.

21 BY MR. KEACH:

22 Q. Did Theresa Knapp-David ever come to you and
23 advocate for Mrs. Trostle to be terminated?

1 A. Not that I recall.

2 Q. Did Mr. Botsford and you ever talk and he
3 advocated to terminate Mrs. Trostle?

4 A. Upon the submission of his memorandum.

5 Q. Well, did he ever talk to you personally about
6 it?

7 A. Just when he dropped the memo off.

8 Q. What did he say?

9 A. That he was dropping a memo off recommending
10 demotion.

11 Q. Did you question him about it?

12 A. No.

13 Q. I mean, can you understand how someone that
14 doesn't work for the state government and look at this
15 memo here and think that this is really a petty reason
16 to demote someone?

17 MS. RUBINSTEIN: Objection.

18 THE WITNESS: No. I don't think it's
19 petty.

20 BY MR. KEACH:

21 Q. So, you can't understand, or anyone looking at
22 this objectively could say that these are really
23 ticky-tack reasons to show someone the road.

1 A. No.

2 Q. Did you have a chance to review any transcripts
3 before you came here today?

4 A. No.

5 Q. Did you review any documents before your
6 testimony?

7 A. Just the termination log.

8 Q. The termination log, that's it.

9 Well, what do you have here in your notepad, or
10 under your notepad here? Well, you got magazines. I
11 can't see what those are.

12 MS. RUBINSTEIN: Governing, a copy says
13 details guy --

14 MR. KEACH: I know there's two -- come
15 on, Heather.

16 In October 2014.

17 BY MR. KEACH:

18 Q. What's under the magazines?

19 A. Memo that goes out from the central office
20 director of finance on phone bills, the directive,
21 employee probation, appointments, provisional, and court
22 find state negligent for rape of an inmate, couple other
23 documents, court case.

1 Q. Which of those documents did you review to
2 testify today?

3 A. I reviewed the directive and the memo relative to
4 records on the phone.

5 MS. RUBINSTEIN: We can mark them.

6 BY MR. KEACH:

7 Q. Could I have your assurance nothing else in there
8 addresses Mrs. Trostle's situation.

9 A. Correct. You can look.

10 Q. I trust you. You're a high ranking government
11 official. What's there not to love?

12 MS. RUBINSTEIN: It's 12 pages.

13 MR. KEACH: These either I already have
14 or I don't really need, so I'm going to pass
15 these over to you.

16 MS. RUBINSTEIN: Well, I would prefer
17 to mark them all as Defendant's 1 so it's
18 clear for the record. Then you can do
19 whatever you want with the rest.

20 MR. KEACH: I'm not really sure how
21 we're going to do that because we have
22 different documents that are stapled
23 together.

1 So, we'll let the record reflect that
2 there's a policy here, directive 2918 that
3 we've marked in this case, I believe.

4 Is that Exhibit 3 there, sir?

5 THE WITNESS: 3.

6 MR. KEACH: So, we already have this
7 marked in the case. I don't need that.
8 We'll reflect he pulled that out of his
9 envelope there.

10 Now we have a monthly telephone bill.

11 MS. RUBINSTEIN: Can I just indicate
12 that the directive that Mr. Martuscello
13 brought is dated January 10, 2011, and the
14 one indicated in the Plaintiff's 3 is from
15 November 8, 2005.

16 MR. KEACH: Well, the one I have is
17 what you gave me.

18 MS. RUBINSTEIN: Presumably that
19 actually does not apply because it's post
20 the incident --

21 MR. KEACH: This isn't post the
22 incident with Mrs. Trostle. This is
23 pre-incident. This is 1/10/2011. So I

1 guess we are going to have to copy this one.

2 I appreciate you pointing that out to
3 me.

4 MS. RUBINSTEIN: You're welcome.

5 MR. KEACH: We'll mark this first one
6 here. I'd like to get them copied so I
7 don't take his originals, okay? And then
8 we'll continue from here.

9 (Recess taken.)

10 BY MR. KEACH:

11 Q. You would have available in some centralized
12 location, would you not, memorandums comparable to
13 Mr. Botsford's memo to you requesting that an employee
14 be terminated or demoted?

15 A. What was your question, would I have them
16 available?

17 Q. Yeah. Let's say I wanted to send a request to
18 the state either for trial purposes or discovery
19 purposes to come on in and look at all the memos that
20 were sent to you seeking to demote or terminate people.

21 Are they going to be in a central location?

22 A. Yeah. If they exist.

23 Q. There's like a folder or something that says

1 termination memos, right?

2 A. I don't know if that's what it says.

3 Q. But they're all in one folder, aren't they?

4 A. I don't know if they're in one folder.

5 Q. They're going to be hard to find.

6 A. We'd probably be able to find them.

7 Q. And what about these termination request forms,
8 they can be found, too, right?

9 A. Yeah.

10 Q. We also go forward here, and there's some
11 discussion in this Plaintiff's Exhibit 1 about
12 Ms. Trostle being tardy on a couple of occasions.

13 Do you see that?

14 A. I did see it.

15 Q. Now, were you provided with any documentation
16 about that before you agreed that she should be demoted
17 for being tardy?

18 A. I don't know if there was other attachments. I
19 don't recall.

20 Q. I remember seeing in this case some logs from the
21 door. You guys have cards you get into the building
22 with.

23 Is that what you use, you have like a security

1 card to get in?

2 A. Yes.

3 Q. And so, there's a log generated from that.

4 A. There is.

5 Q. Did you see those log records as part of your
6 determination about whether or not Mrs. Trostle should
7 be demoted?

8 A. I have a recollection, but I don't really
9 specifically recall.

10 Q. Do you know if those log records were pulled
11 before or after she was demoted?

12 A. I don't know. I don't recall.

13 Q. Well, do you know if anybody else had -- if this
14 happened before -- because I don't think it did. I
15 think it happened after, but we'll figure that out
16 later.

17 Do you know if anyone else had their log entries
18 scrutinized to determine whether or not they were late?

19 A. We have pulled logs before.

20 Q. So, I think I already asked you. I just want to
21 be thorough so I can move on to something else.

22 Do you know whether or not any effort was made to
23 audit anyone else's records to determine whether or not

1 they had the same level of tardiness, alleged tardiness,
2 that Mrs. Trostle did?

3 A. I know that we have looked at those logs in the
4 past for other employees.

5 Q. How about in the office of classification and
6 movement at the time that this was going on?

7 A. I don't know.

8 Q. I mean, you've looked at those logs in the past
9 when you're looking to substantiate someone for
10 tardiness and then you can document it based on when
11 they swiped their card, right?

12 A. Yes. For non-union employees.

13 Q. For non-union employees, right.

14 So we've already established that it can be an
15 acceptable practice if someone is a few minutes late for
16 them to stay late; fair to say?

17 A. With supervisor approval.

18 Q. Fine, with supervisor approval.

19 But someone could just do that on their own, too;
20 isn't that right? What if their supervisor's not
21 around, hey, I was five minutes late today; I'll stay
22 five minutes later?

23 A. We don't have flex time in the agency.

1 Q. I understand that. I'm not suggesting you have
2 flex time. I'm just basically saying, let's say I come
3 in to work today. My boss isn't here. I'm five minutes
4 late. And I say to myself, you know what? I'm just
5 going to stay five minutes extra today and make sure
6 that I make up the time that I was late.

7 Nothing wrong with that, is there?

8 MS. RUBINSTEIN: Objection.

9 THE WITNESS: They should have
10 supervisory approval.

11 BY MR. KEACH:

12 Q. Should have but doesn't always happen; fair to
13 say?

14 A. I don't know. It doesn't always happen.

15 Q. They don't have any timecards, right?

16 A. There's timecards.

17 Q. But not everybody uses them, do they?

18 A. Everybody fills out a timecard.

19 Q. It's like a written timecard.

20 A. Right.

21 Q. And doesn't it just say the hours, the number of
22 hours you work in a day?

23 A. Actually, not for that position.

1 Q. Well, what does it say?

2 A. It tells the hours you don't work.

3 Q. So if you're absent for a day, you fill that in
4 your timecard.

5 A. For not overtime eligible. It's the exclusions.

6 Q. So, I work five hours this week but I'm sick a
7 day. I'll fill in that I took seven and a half hours
8 sick leave on my timecard.

9 A. On that day.

10 Q. On that day. And that's it. That's all you fill
11 in.

12 A. Yeah.

13 Q. Do you have any knowledge of Mrs. Trostle
14 fraudulently filling out her timecards?

15 A. No.

16 Q. Do you have any knowledge that Ms. Trostle didn't
17 fill out her timecards accurately?

18 A. No.

19 Q. Now, do you know whether anybody formally
20 counseled -- meaning in a written counseling memo --
21 Mrs. Trostle for being late?

22 A. I don't know. I don't know.

23 Q. So how many employees have you been involved with

1 either terminating or demoting based on tardiness
2 issues?

3 A. I can't put a number on it. I don't know if
4 there's any or if there's ten. I don't know.

5 Q. So, you don't know if there's any.

6 A. Right.

7 Q. Who works under your supervision?

8 A. Directly.

9 Q. Yeah. You have a secretary.

10 A. Yes.

11 Q. You have some assistant directors.

12 A. Correct.

13 Q. Is your secretary ever late?

14 A. There has been times.

15 Q. Snow.

16 A. Sure.

17 Q. Inclement weather.

18 A. Sure.

19 Q. Kids.

20 A. No.

21 Q. She doesn't have any kids.

22 A. No. Adult.

23 Q. Just running late, getting a late start in the

1 day, coming in a little late, that ever happen to her?

2 A. Sure.

3 Q. Did you write her up?

4 A. No.

5 Q. What did you do?

6 A. She charged her time.

7 Q. You had her charge her time.

8 A. Typically.

9 Q. And she did that.

10 A. Yeah.

11 Q. And that was the extent of any penalty she had to
12 pay.

13 A. Yes.

14 Q. Now, she's an hourly employee, isn't she?

15 A. What do you mean by hourly?

16 Q. I mean she works by the hour for the state.

17 She's an hourly employee versus a salaried employee.

18 A. Sure. Yes.

19 Q. So, she comes in every day and she swipes a
20 timecard when she comes in to the office to show when
21 she comes and when she goes, right?

22 A. No.

23 Q. She does not. She has to fill out a timesheet

1 like you're referring to.

2 A. Recording hours actually worked but still filling
3 out manual timecards in central office.

4 Q. Now, in your job there are occasions when you
5 have to stay late, isn't there?

6 A. Yes.

7 Q. You got something bad going on that needs your
8 attention, an immediate issue, you stay late; you're
9 working hard, right?

10 A. Yes.

11 Q. So, you routinely work more than the seven and a
12 half hours a day that you are paid to work; isn't that
13 right?

14 A. Yes.

15 Q. And do you know whether or not Mrs. Trostle ever
16 had to work after hours to address her job
17 responsibilities as assistant director for
18 classification and movement?

19 A. I don't know.

20 Q. And so, for these occasions when she is allegedly
21 late coming in to the office, do you know whether or not
22 she made that time up at some other point in time by
23 working hard or staying late one night to deal with

1 things?

2 Do you know whether or not that's the case?

3 A. I don't.

4 Q. So just so we're clear, you don't believe, as you
5 sit here today, that Mrs. Trostle was somehow defrauding
6 the state government in not working the hours she was
7 paid to work, do you?

8 MS. RUBINSTEIN: Objection.

9 THE WITNESS: I don't think she was
10 defrauding by not working.

11 BY MR. KEACH:

12 Q. And you don't know whether on these limited
13 occasions where she was late, whether or not she made
14 that time up at some other point in time by working
15 really hard during an evening when there was a lot of
16 things going on; fair to say?

17 MS. RUBINSTEIN: Objection.

18 THE WITNESS: Correct.

19 BY MR. KEACH:

20 Q. So, if we can't establish that Mrs. Trostle, in
21 fact, was not working -- or excuse me. We can't
22 establish that there's some kind of fraud on
23 Mrs. Trostle's part that she wasn't working the hours

1 she was paid to work, then why would her being tardy on
2 a handful of occasions justify her demotion?

3 MS. RUBINSTEIN: Objection.

4 THE WITNESS: The tardiness was not the
5 sole reason why she was demoted. It was the
6 totality of the memorandum.

7 BY MR. KEACH:

8 Q. So, it was the totality of making on average
9 three minutes of personal phone calls a day and on one
10 occasion being on the phone for 80 minutes when her
11 mother was sick in Puerto Rico and being tardy on a
12 handful of occasions that justified her demotion; fair
13 to say?

14 MS. RUBINSTEIN: Objection.

15 THE WITNESS: And not reporting the
16 personal use.

17 BY MR. KEACH:

18 Q. And not reporting the personal use of the phone.

19 A. Yes.

20 Q. You and I can't agree today that she even had an
21 opportunity to review the bills; fair to say?

22 MS. RUBINSTEIN: Objection.

23 THE WITNESS: I believe that all

1 employees review the bill.

2 (Exhibit 12 marked for identification.)

3 BY MR. KEACH:

4 Q. Fine. I got a memo here, and I'll pass the
5 originals back to you. We can mark that as -- I think
6 we're up to Plaintiff's Exhibit 12. It's entitled
7 "Monthly Phone Bills."

8 Now, my first concern, sir, looking at this is,
9 there's no date on it. Do you have any idea when
10 Exhibit 12 came into being?

11 A. This particular one.

12 Q. Yeah.

13 A. Would have been after the incident.

14 Q. This policy was generated after the incident.

15 A. This particular document.

16 Q. Yeah. Was generated after Ms. Trostle was
17 demoted.

18 A. This document.

19 Q. Yes.

20 A. Yes.

21 Q. How do you know that?

22 A. Because it says I'm the deputy commissioner for
23 administrative services, and I know when that occurred.

1 Q. I missed that. I appreciate you pointing it out
2 to me. I saw Anthony Antinucci, and I know when
3 Mr. Fisher left, but okay.

4 So when did you become the deputy commissioner
5 for administrative services?

6 A. August of 2012.

7 Q. And that would have been just shortly after --
8 two months after -- well, no, it would have been a
9 year-plus after Ms. Trostle left, right, or was demoted,
10 excuse me?

11 A. Yeah.

12 Q. Well, she was demoted in 2011, and you became
13 acting commissioner in 2012. So what was in place
14 before that?

15 A. Deputy commissioner.

16 Q. Well, deputy commissioner. So, what was in place
17 before this?

18 A. I believe it was the same memo. Just this
19 particular document with my letterhead I know happened
20 after the occasion.

21 Q. Well, I guess it says here that -- and we don't
22 know if that memo applies to -- we don't know what the
23 prior memo is. Maybe it's been served on me. I have to

1 figure that out at a later time.

2 But it says here that, "an employee is to review
3 the calls listed and sign their individual call sheet to
4 verify that all calls were business related."

5 Do you see that?

6 A. Mm-hmm.

7 Q. Now, are you familiar with the crime of offering
8 a false record for filing?

9 A. Yeah.

10 Q. Did you ever hear of that?

11 A. Sure.

12 Q. And so, if an employee signed their toll sheet
13 and falsely represented that all the calls were business
14 related, that would arguably be a crime under the New
15 York Penal Law, wouldn't it?

16 MS. RUBINSTEIN: Objection.

17 THE WITNESS: I'm not an attorney.

18 BY MR. KEACH:

19 Q. Well, I can tell you that that would be a crime.

20 A. Okay.

21 Q. Do you know, as you sit here today, whether or
22 not Mrs. Trostle actually signed her individual toll
23 sheet and reflected that her calls were business

1 related?

2 A. We have no record that Ms. Trostle indicated
3 personal calls on the toll sheet.

4 Q. Well, what's the toll sheet?

5 Is that this form that was filled out by Sethann
6 Bogardus? I know that Sethann Bogardus is the one who
7 handwrote those entries. And we've also established
8 that Sethann Bogardus strongly disliked Mrs. Trostle.

9 So, apart from what we have from Sethann
10 Bogardus, these monthly toll sheets, do we have anything
11 to show in writing that Mrs. Trostle received these
12 bills?

13 A. No.

14 Q. But it says here she's supposed to sign -- it
15 says, "each employee is to review the calls list and
16 sign their toll sheet to verify that all calls were
17 business related."

18 Do you see that?

19 A. I do.

20 Q. Is that being done now?

21 A. I don't know what they do in class and movement.

22 Q. Well, did you see any documentation that would
23 reflect that Mrs. Trostle, in fact, reviewed her calls

1 and affirmatively represented that all her calls were
2 business related?

3 A. No. I saw the document that she did not report
4 any personal call or pay for any personal calls.

5 Q. But the document you were referring to wasn't
6 signed by Mrs. Trostle, was it?

7 A. No.

8 Q. That was prepared by someone else.

9 A. I don't know who prepared the document.

10 Q. We've established that Sethann Bogardus prepared
11 the document. So, again, I just want to establish, you
12 didn't see anything in your -- at any point in time
13 reflect that Mrs. Trostle, in fact, had an opportunity
14 to review her phone bills; fair to say?

15 A. Correct.

16 (Exhibit 13 marked for identification.)

17 MR. KEACH: Now, we'll mark the
18 directive, which is the new directive that
19 was in place at the time of Mrs. Trostle's
20 demotion. And we'll mark that as
21 Exhibit 13. This is the same number
22 directive 20918, and it's entitled "State
23 Furnished Telephone Equipment and Services."

1 BY MR. KEACH:

2 Q. Just before we go too far into this, whose
3 signature is up there?

4 A. Gail Haponik.

5 Q. Who is Gail Haponik?

6 A. My predecessor.

7 Q. So, she was previously the deputy commissioner
8 for administrative services.

9 A. Correct.

10 Q. So, let's take a look at the second page. And
11 just so we're clear, the phrase on this policy is still
12 the same, "state telephones are intended for transaction
13 of business only. With the approval of the employee's
14 supervisor, employee may make personal phone calls in
15 emergency situations."

16 That's the same as the one we looked at
17 previously, which was marked as Exhibit 3; is that
18 correct?

19 A. Yeah. I think the policy statement is different,
20 though.

21 Q. What's the policy state?

22 A. The section above that's labeled "policy
23 statement."

1 Q. Sure. Let's take a look at Exhibit 3 and make
2 sure we're all on the same page here.

3 I don't see any difference between 3 and 13.

4 A. Okay.

5 Q. It's certainly formatted a little differently.

6 A. Okay. I didn't have this in front of me. I just
7 thought that this --

8 Q. But that policy statement also says, "employees
9 should use public telephones to conduct personal
10 business during rest breaks, meals, before and after
11 working hours."

12 It says that, right?

13 A. Yup.

14 Q. So, I want you to go on to part G.

15 A. I'm sorry, G.

16 Q. Part 2-G on the second page.

17 A. Yup.

18 Q. And it says here, "deputy superintendent for
19 administration reviews our reports. If inappropriate
20 calling activity is reported or otherwise detected, the
21 following measures would be contemplated, depending on
22 the situation involved and the circumstances involved:
23 monetary reimbursement, informal counseling, formal

1 counseling, disciplinary action."

2 Do you see that?

3 A. I do.

4 Q. Now, apart from Ms. Trostle reviewing the bills,
5 which we don't know if that happened or not, was she
6 ever given an opportunity to make monetary reimbursement
7 for her \$7 of phone calls over a 14-month period?

8 A. She's given that opportunity on a monthly basis.

9 Q. I said apart from that, because we don't know --
10 and frankly, I haven't seen any documentation in this
11 case of Mrs. Trostle actually getting those bills.

12 A. Okay.

13 Q. But I understand your testimony that it's your
14 opinion she was given an opportunity on a monthly basis.

15 I'm asking: Apart from that, was Mr. Trostle
16 given an opportunity to make monetary reimbursement for
17 her calls before she was demoted?

18 A. No.

19 Q. And she wasn't either informally or formally
20 counseled, was she?

21 A. No.

22 Q. But here's what I don't understand. Even though
23 she's a provisional employee, you had the ability to

1 take disciplinary action against her, didn't you?

2 A. No.

3 Q. You didn't. You didn't have the ability to,
4 apart from her provisional status, to take additional
5 disciplinary action against her.

6 MS. RUBINSTEIN: Objection.

7 THE WITNESS: She was subject to
8 discipline in her hold item, which she
9 returned to, but I didn't have that
10 authority.

11 BY MR. KEACH:

12 Q. So, but you had the ability to recommend
13 discipline, don't you?

14 A. Yes.

15 Q. The way that this is written up sounds like a
16 really serious situation. This woman was doing all this
17 bad stuff, and she was demoted and sent back to her hold
18 item.

19 Why wasn't she also referred for discipline by
20 labor relations?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: I didn't refer it to
23 discipline because I felt that the return to

1 her hold item was sufficient.

2 BY MR. KEACH:

3 Q. Sufficient for what?

4 A. Based on the totality of what was presented, I
5 didn't feel it was necessary to recommend disciplinary
6 action against her in her permanent position but just a
7 removal from her provisional appointment.

8 Q. Well, explain that to me. If this is serious
9 enough to substantiate removing her from central office
10 and costing her \$20,000 a year, sending her back to
11 Greene Correctional Facility to work as a correctional
12 counselor, why isn't this serious enough to enter a
13 notice of discipline against her and try to terminate
14 her employment with the state government?

15 A. Again, my opinion was that that was sufficient,
16 and I didn't make further referral.

17 Q. Well, the reason, though, you didn't make the
18 referral is because, if it went to a notice of
19 discipline, then there would have to be a hearing; isn't
20 that right?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: That's not why.

23 MR. KEACH: That's not why.

1 THE WITNESS: No.

2 BY MR. KEACH:

3 Q. I mean, basically your office was judge, jury,
4 and executioner as it related to demoting her back to
5 her hold item, right?

6 MS. RUBINSTEIN: Objection.

7 THE WITNESS: I am the designated
8 appointed authority in that capacity.

9 BY MR. KEACH:

10 Q. But if it went over to labor relations, then
11 there would have to be action in front of the public
12 employee relations board, wouldn't there, if it went to
13 a hearing?

14 MS. RUBINSTEIN: Objection.

15 THE WITNESS: It doesn't actually
16 happen in front of PERB, but they would have
17 had a hearing.

18 BY MR. KEACH:

19 Q. Well, the hearing officer is appointed by PERB,
20 right?

21 But there would have been a hearing and there
22 would have been scrutiny about what you did, right?

23 MS. RUBINSTEIN: Objection.

1 THE WITNESS: No. There would have
2 been scrutiny relative to whatever penalty
3 we were seeking to impose in her permanent
4 position, but no scrutiny over this. This
5 is not subject to review over local
6 provisional.

7 BY MR. KEACH:

8 Q. Who else up the chain of command above you
9 reviewed this determination?

10 A. Up my chain of command.

11 Q. Yeah.

12 A. No one.

13 Q. Did you have any involvement in the --

14 A. Not that I'm aware of.

15 Q. So, this didn't go to, for instance, the -- you
16 would have been acting under the deputy commissioner for
17 administrative services, correct?

18 A. That is my direct supervisor, would have been.

19 Q. That would have been your direct supervisor at
20 the time this occurred.

21 A. Yes.

22 Q. And the deputy commissioner didn't have any
23 involvement in making this determination.

1 A. No.

2 Q. Meaning your predecessor.

3 A. Correct.

4 Q. Did it ever enter your mind when you were doing
5 this that the state was going to get sued?

6 A. No.

7 Q. No one ever talked about that up and down the
8 chain of command, if we do this, we might get sued.

9 A. No.

10 MS. RUBINSTEIN: Objection.

11 BY MR. KEACH:

12 Q. Well, how about after, you know Ms. Trostle filed
13 an application with the New York State Division of Human
14 Rights, don't you?

15 A. No.

16 Q. You're not aware of that.

17 A. No.

18 Q. You're not aware that the Division of Human
19 Rights found probable cause to believe that she was
20 discriminated against on the basis of race in the
21 workplace.

22 MS. RUBINSTEIN: Objection.

23 THE WITNESS: No. Other than my

1 testimony being necessary here today, I have
2 not seen a complaint, read a complaint. So
3 no.

4 BY MR. KEACH:

5 Q. Before you became deputy commissioner, did you
6 ever discuss this with any of your supervisors about
7 what happened here?

8 A. No.

9 Q. Were you aware that there was an investigation
10 made by diversity management?

11 A. No.

12 Q. Did you have any role in the investigation by
13 diversity management?

14 A. No.

15 Q. There was a report prepared by a woman by the
16 last name of Brooks. I think the first name was
17 Marlene. I could be wrong about that, but I think her
18 last name was Brooks. Prepared a memorandum to Ms.
19 Nazon that expressed some concern about the fact that
20 Mrs. Trostle wasn't given an opportunity to pay for her
21 phone calls before she was demoted.

22 Do you know anything about that?

23 A. No.

1 Q. Were you provided with a copy of the memo?

2 A. No.

3 Q. Did you ever have a chance to review it?

4 A. No.

5 Q. Did you ever have any input to it?

6 A. No.

7 Q. And so, you never saw it after the fact.

8 A. No.

9 Q. And no one ever interviewed you as part of that.

10 A. Not that I recall. No.

11 Q. Now, I want to establish just a couple of things,
12 and then I want to wrap up and get you out of here.

13 I want you to -- if there was an impermissible
14 motive for demoting Mrs. Trostle, meaning that there was
15 an effort made to get rid of her because of her national
16 origin or her race, that decision would not implicate
17 your actions in this case, would it?

18 MS. RUBINSTEIN: Objection.

19 THE WITNESS: Say it again.

20 BY MR. KEACH:

21 Q. I'll phrase it differently. It probably wasn't
22 the best worded question.

23 If Theresa Knapp-David didn't like people who

1 were Hispanic and directed Mr. Botsford to get rid of
2 Melissa Trostle because she didn't like Hispanics, and
3 utilized all this stuff as pretext to get rid of a
4 Hispanic, that wouldn't implicate your decision, would
5 it?

6 MS. RUBINSTEIN: Objection.

7 THE WITNESS: No.

8 BY MR. KEACH:

9 Q. So if that happened, that happened, that would be
10 Theresa Knapp-David's responsibility, not yours,
11 correct?

12 MS. RUBINSTEIN: Objection.

13 THE WITNESS: Yes.

14 BY MR. KEACH:

15 Q. And if Theresa Knapp-David decided that she
16 wanted to get rid of an employee who could have used too
17 much family medical leave, in her opinion, and used this
18 information as pretext to get rid of that employee, that
19 decision would rest with Theresa Knapp-David, not with
20 you, wouldn't it?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: Decisions in terms of the
23 same context you just described, right?

1 MR. KEACH: Yeah.

2 THE WITNESS: Yes.

3 BY MR. KEACH:

4 Q. Just to make it clear, race didn't enter into
5 your decision about this, right?

6 A. No.

7 Q. And family medical leave didn't enter into your
8 decision about that, right?

9 A. No.

10 Q. And you weren't aware when you made this decision
11 that Mrs. Trostle had already told her supervisor,
12 Mr. Botsford, that when she returned from family medical
13 leave she was going to file a diversity complaint
14 against Ms. Knapp-David.

15 A. No.

16 Q. You didn't know about that.

17 A. No.

18 Q. And did you know that Mrs. Trostle confronted
19 Theresa Knapp-David about her treatment of her based on
20 national origin before she left on family and medical
21 leave and then was ultimately demoted?

22 A. No.

23 Q. Are you aware that Ms. Knapp-David, in the

1 limited e-mail that I've been able to get in this case,
2 referred to Mrs. Trostle as an albatross?

3 A. No.

4 Q. Now, if you knew at the time that you were
5 reaching this decision that Mrs. Trostle had, in fact,
6 complained to her supervisor about Ms. Knapp-David's
7 conduct toward her on the basis of race, that would have
8 potentially affected your decision here, wouldn't it?

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: I don't know that it
11 would have changed the outcome, but it would
12 have been something that I would have wanted
13 to know.

14 BY MR. KEACH:

15 Q. Yeah. It would have been something you would
16 have looked into it, isn't it?

17 MS. RUBINSTEIN: Objection.

18 THE WITNESS: Yes.

19 BY MR. KEACH:

20 Q. Because it's illegal to retaliate against someone
21 when they're complaining about discrimination in the
22 workplace, isn't it?

23 MS. RUBINSTEIN: Objection.

1 THE WITNESS: Yes.

2 BY MR. KEACH:

3 Q. And it's the policy of the New York State
4 Department of Corrections that one of the options you
5 have to complain about racial discrimination in the
6 workplace is to first complain to your supervisor as
7 part of the process; isn't that right?

8 A. Yes. And the office of diversity management, as
9 well.

10 Q. Well, you have different options. My
11 understanding of the policy is you have different
12 options. You can complain to your supervisor, you can
13 complain to the office of diversity management, or I
14 believe it's the case in DOCCS, you can also just go
15 straight to the EOC, if you choose to.

16 A. Or DHR.

17 Q. Or DHR. But you have those three options, right?

18 And that policy also has a strict prohibition
19 against retaliating against someone for complaining
20 about racial discrimination in the workplace, doesn't
21 it?

22 A. Absolutely.

23 Q. And so, if Mrs. Trostle took the first step of

1 complaining to her supervisor, Mr. Botsford, about
2 racial discrimination in the workplace, and then she was
3 retaliated against for that, that would be improper
4 under the state's rules, wouldn't it?

5 MS. RUBINSTEIN: Objection.

6 THE WITNESS: Retaliation is not
7 appropriate.

8 BY MR. KEACH:

9 Q. What's that?

10 A. Retaliation -- yes.

11 Q. If she started the process by complaining to her
12 supervisor and then was terminated, that would be
13 improper under the state's rules, right?

14 MS. RUBINSTEIN: Objection.

15 THE WITNESS: If that was a cause and
16 effect, yes.

17 BY MR. KEACH:

18 Q. And the same can be said that if she was
19 terminated for taking too much family medical leave,
20 that also would be impermissible, wouldn't it, under the
21 state's rules?

22 MS. RUBINSTEIN: Objection.

23 THE WITNESS: If that was the cause and

1 effect, yes.

2 BY MR. KEACH:

3 Q. Were you present at the time that Mrs. Trostle
4 was demoted?

5 A. No.

6 Q. So, she was just handed this letter -- and we
7 have this as Exhibit 5, which has your signature, right?

8 A. Yes.

9 Q. So you weren't present when that was provided to
10 her.

11 A. No.

12 Q. Do you know who gave it to her?

13 A. I don't. Most likely the supervisor of that
14 unit.

15 Q. Well, if you're signing off a letter to terminate
16 somebody, why don't you be there in person?

17 MS. RUBINSTEIN: Objection.

18 THE WITNESS: I can't be all over the
19 state.

20 BY MR. KEACH:

21 Q. This is like two floors away, though.

22 A. I know. But if you can't be in Sing Sing, then
23 why would I be two floors away? Supervisor serves the

1 notice.

2 Q. Has anything you learned today in your deposition
3 today caused you to question your action in terminating
4 her -- excuse me, demoting Ms. Trostle?

5 MS. RUBINSTEIN: Objection.

6 THE WITNESS: No. I stand by the facts
7 that I had to make the determination that
8 the demotion was appropriate.

9 BY MR. KEACH:

10 Q. I'm talking about today, after what you learned
11 in this deposition, are you still standing by your
12 decision?

13 MS. RUBINSTEIN: Objection.

14 THE WITNESS: I don't know, based on
15 what I learned, what's fact and what's not.
16 I mean, I heard you ask a lot of questions.
17 So, I mean, depending on what of the
18 information is actually factual, I would
19 have concern if there were factual things
20 that flowed from that.

21 BY MR. KEACH:

22 Q. And so, what facts would we -- would you want to
23 see established today that would cause you to question

1 your decision?

2 MS. RUBINSTEIN: Objection.

3 THE WITNESS: Well, we talked about
4 retaliation for the purpose of the
5 utilization of FMLA and for what is a
6 complaint relative to origin or ethnicity.
7 Those are things that, if this was a
8 pretext, to use your term, then that would
9 cause me for concern. But that somebody
10 made a complaint and this is separate and
11 aside and not a pretext, then I may view
12 that differently.

13 BY MR. KEACH:

14 Q. How about the difference in treatment?

15 MS. RUBINSTEIN: Objection.

16 BY MR. KEACH:

17 Q. Meaning the level of scrutiny applied to
18 Mrs. Trostle that was not applied to others in her
19 department who were similarly situated.

20 Does that cause you some concern?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: In terms of reviewing the
23 phone bills?

1 MR. KEACH: Yeah, sure.

2 THE WITNESS: Well, when things arise
3 to a level that you have to look further
4 into it, it depends what precipitated the
5 review.

6 BY MR. KEACH:

7 Q. Well, it depends on what precipitated the review.

8 A. For instance --

9 Q. I just want you to assume for a minute here that
10 any number of individuals -- and I'm not going to engage
11 in this sort of analysis for the jury because we'll end
12 up having a three-week trial, and that's not in
13 anybody's best interest here. If we're going to do
14 that, I'm going to let the state do it, and they can
15 bore the jury to tears and get punished accordingly.

16 But let's assume that I had -- and I don't. But
17 let's assume that I had access to some of these phone
18 bills and I could find a comparable number of 800 calls
19 made during working hours, and I could also find a
20 number of questionable phone charges that people didn't
21 pay for, okay?

22 Those people -- you would agree with me that
23 individuals in that situation would be similarly

1 situated to Mrs. Trostle, didn't pay for their calls,
2 made a lot of 800 calls off their state-issued phones,
3 right?

4 A. Correct.

5 Q. So, those individuals weren't subjected to the
6 same scrutiny as Mrs. Trostle was, assuming that they
7 did these things, that they were similarly situated.

8 Wouldn't that cause you some concern?

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: Yeah.

11 BY MR. KEACH:

12 Q. Because that would violate the rule of providing
13 people with equal treatment, wouldn't it?

14 MS. RUBINSTEIN: Objection.

15 THE WITNESS: We should be looking at
16 those individuals, as well.

17 MR. KEACH: I want to move forward just
18 briefly. And we'll mark as Exhibit 14 this
19 employee probation policy.

20 (Exhibit 14 marked for identification.)

21 BY MR. KEACH:

22 Q. Now, I looked that over. My understanding was --
23 meaning Exhibit 14. My understanding is that

1 Mrs. Trostle was not a probationary employee at the time
2 that she was demoted back to her hold item.

3 A. Correct.

4 Q. Is there any part of this policy that would apply
5 to Ms. Trostle?

6 A. No. I didn't review this as part of this case.

7 Q. Well, then that makes that set of questions
8 pretty easy to address. We'll move on past that.

9 I also have a policy entitled "1800
10 Appointments."

11 MR. KEACH: We'll mark that as
12 Exhibit 15.

13 And, Heather, I think that covers the
14 landscape of everything you handed over to
15 me. Am I right about that?

16 MS. RUBINSTEIN: My understanding.

17 (Exhibit 15 marked for identification.)

18 BY MR. KEACH:

19 Q. Now, I guess I want to start with:
20 Mrs. Trostle's position today is not provisional
21 employment, is it?

22 A. Her current position.

23 Q. No. Her position -- the position that she held

1 today, meaning assistant director of classification and
2 movement, that is no longer a provisional appointment,
3 is it?

4 A. I don't know offhand.

5 Q. How about classification analyst?

6 A. No.

7 Q. And that reminds me: Can you tell me, sir, why,
8 if you didn't think that this justified disciplinary
9 action under DOCCS policies as it relates to her job
10 back in Greene Correctional Facility, why wasn't
11 Mrs. Trostle given an opportunity to stay at central
12 office and do something else?

13 For instance, if her being an assistant director
14 wasn't working out, why wasn't she allowed to stay as a
15 classification analyst?

16 MS. RUBINSTEIN: Objection.

17 THE WITNESS: The process by which we
18 review probationary demotions and/or
19 provisional removal or temporary removal is
20 that they go back to the position that they
21 actually have property rights or tenure in,
22 which would be the last permanent
23 competitive position that they maintained.

1 In accordance with this policy that you
2 just handed me as Exhibit 15, when you are
3 appointed to a provisional position in the
4 same appointing authority or agency, you
5 retain a hold on your last permanent
6 position, which was at Greene Correctional
7 Facility. I believe at that time it would
8 have been a correction counselor now or an
9 offender rehabilitation coordinator, ORC.

10 BY MR. KEACH:

11 Q. Well, Ms. Trostle worked for several years as a
12 classification analyst.

13 How can you work for years as a provisional
14 appointment without having to take a civil service exam?

15 A. Civil service administers the examination process
16 for the positions in state government. So it was that
17 it probably wasn't scheduled for an examination during
18 her period of time as a provisional, and/or another
19 instance could have been -- and I don't believe it's the
20 case -- that there was an exam, and there were -- when
21 canvassed, there were less than three acceptors breaking
22 the eligible list, allowing for continued provisional
23 appointments.

1 Q. But you don't know what the case was with
2 Mrs. Trostle's employment, fair to say, whether there
3 was no test or whether there weren't enough people who
4 applied?

5 A. I believe there was no examination for a long
6 period of time.

7 Q. Well, now, I have here a series of -- I'm trying
8 to figure it out. Maybe you can help me out. I don't
9 see anything in here about the circumstances under which
10 a provisional appointment would be revoked for purposes
11 of disciplinary action, or I know you don't consider it
12 discipline, but whatever you call it, demotion,
13 misconduct. I don't see anything in that in here.

14 Can you help me find that.

15 MS. RUBINSTEIN: Objection.

16 MR. KEACH: And when I say in here, I
17 mean in Exhibit 15.

18 MS. RUBINSTEIN: Objection still
19 stands.

20 MR. KEACH: No problem. I understand.
21 Go ahead.

22 THE WITNESS: Under the .2 policy,
23 specifically .211, "a provisional employee

1 will not serve a probationary term, nor will
2 a provisional appointment bestow any
3 property right or right of tenure to the
4 position. The appointing authority may
5 remove somebody from a provisional
6 appointment at any time for any reason or no
7 reason."

8 BY MR. KEACH:

9 Q. It's fair to say that you didn't even have to
10 give a reason.

11 A. Correct.

12 Q. And neither did Ms. Knapp-David or Mr. Botsford.
13 They didn't have to give a reason. They just could have
14 said, it's not working out, Ms. Trostle is not working
15 out, we want her removed and sent back to her old item;
16 fair to say?

17 A. They had to give me a reason.

18 Q. Why did they have to give you a reason?

19 A. Because I'm the centralized appointing authority.

20 Q. Well, if their reason was, we don't like her and
21 we don't want to work with her anymore, we want her sent
22 back to her hold item, that that would be appropriate,
23 right, because she doesn't have any right to the

1 position?

2 A. No.

3 MS. RUBINSTEIN: Objection.

4 BY MR. KEACH:

5 Q. Here's what I'm trying to figure out: What are
6 the standards by which someone would lose their
7 provisional appointment for misconduct, because I can't
8 find it here?

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: The standard is me, as
11 the appointing authority, looks at the facts
12 and circumstances presented and makes a
13 determination on rather than to revoke
14 somebody from a provisional appointment.

15 BY MR. KEACH:

16 Q. And so, where is that in here, in this
17 provisional appointment? Well, first off, what is this?
18 What is this?

19 It says 1800 appointments. It's personnel --
20 state personnel management manual.

21 A. That's what it is.

22 Q. And so, you didn't just let Ms. Trostle go
23 because people didn't like her and wanted her sent back

1 to her hold item. You let her go for reasons that would
2 be considered misconduct.

3 We can agree about that, right?

4 MS. RUBINSTEIN: Objection.

5 BY MR. KEACH:

6 Q. Misconduct, misuse of state phones, and being
7 tardy all the time.

8 A. Yes.

9 Q. And so, where in here do we have a process by
10 which that can happen?

11 I don't see it anywhere. There's --

12 A. Again, section 2.11, in that she does not bestow
13 any property rights to the position. And the review
14 process, which I define that I go through, is something
15 that I go through or we go through at DOCCS as an agency
16 whether she can be moved for no reason or reason.

17 Q. I understand she can be removed for no reason.

18 I show up. Let's assume tomorrow I get appointed
19 to be the director of classification and movement, and I
20 decide I want to have a new team. And I said, you know
21 what? I don't like this assistant director. I want her
22 to go back to her hold item. I want to get someone that
23 I know.

1 I can do that, right?

2 A. No.

3 Q. Well, that's what I'm trying to figure out here.

4 What is the standard, other than -- well, let me
5 step back and ask this a different way.

6 Where is the standard in writing for how to
7 address demoting a provisional employee?

8 Where is it?

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: In directive 2200, the
11 functions of the bureau of personnel, and
12 then -- I'm not quoting it -- but it
13 outlines that the director of human
14 resources and now the director of personnel
15 as the centralized appointing authority.
16 One of the duties, as I previously
17 described, as reviewing requests for
18 managers of probationary terminations,
19 provisional and temporary removal from
20 service. So, it is outlined in that
21 directive that that's where the authority
22 lies. So the managers would submit
23 justification for that removal.

1 BY MR. KEACH:

2 Q. It says here that the provisional appointment may
3 be revoked at any time by the department of civil
4 service, right?

5 A. Where are you referencing?

6 Q. It would be the second page at the bottom, .230.

7 A. The one above that says a provisional employee
8 may be terminated at any time by the appointing
9 authority. And the secondary reason is by the
10 department of civil service for another reason, not
11 secondary. And I was the appointing authority.

12 Q. I'll look at this 2200 issue. I'm sure I can
13 find it here at the same website that this came from,
14 Exhibit 15, the 1800 appointments policy. But I
15 understand you're the appointing authority. You get to
16 decide whether or not to let someone go from their
17 provisional appointment.

18 But can you and I agree that there are no
19 concrete standards, meaning rules, which would show when
20 someone should or should not be removed from a
21 provisional appointment for misconduct?

22 MS. RUBINSTEIN: Objection.

23 THE WITNESS: Correct.

1 BY MR. KEACH:

2 Q. We agree on that, don't we?

3 A. Yes.

4 Q. There are no formal hard and set rules about
5 that.

6 MS. RUBINSTEIN: Objection.

7 MR. KEACH: Correct.

8 THE WITNESS: Correct.

9 BY MR. KEACH:

10 Q. So, it's left to your sole discretion, right?

11 A. Correct.

12 Q. Now, there's nothing in this policy that would
13 preclude Mrs. Trostle, if she's being removed from the
14 position of assistant director, to be allowed to then
15 become a classification analyst as a provisional
16 appointment, is there?

17 MS. RUBINSTEIN: Objection.

18 BY MR. KEACH:

19 Q. And I understand what you believe the procedures
20 are, but that doesn't say anything in this policy about
21 that, does it?

22 MS. RUBINSTEIN: Objection.

23 THE WITNESS: The policy talks about

1 provisional appointments. So in terms of
2 the class analyst position, the practice is
3 to return to what you have property rights
4 in. But as far as another appointment in
5 provisional service, it would have to follow
6 the appropriate processes as it's outlined
7 in the collective bargaining agreement of
8 the said position, as well as the law as
9 outlined in section 65 of the civil service
10 law, which is amplified by title four of the
11 civil service rules and regulations and 1800
12 of the state personnel management manual.

13 BY MR. KEACH:

14 Q. I understand all of that, but there's no reason
15 why Mrs. Trostle couldn't be returned to a lower-level
16 provisional appointment if all that stuff was complied
17 with, right?

18 A. If everything was complied with and there was no
19 preferred list and there was no eligibility list and the
20 posting was completed, if all of the provisions were
21 complied with, civil service approved, then no, there
22 would be nothing that precluded it. Those are a lot of
23 things.

1 Q. I understand. Beyond this conversation where
2 Mr. Botsford comes in with his memo and hands it to you,
3 did you have any further conversations with him about
4 Mrs. Trostle's demotion?

5 A. No.

6 Q. Do you know if any of your subordinates had any
7 additional conversations with him about Mrs. Trostle's
8 demotion?

9 A. I don't.

10 Q. How about Theresa Knapp-David, did you ever talk
11 to her about this?

12 A. No.

13 Q. Do you know if any of your subordinates talked to
14 Theresa Knapp-David about this?

15 A. I do not.

16 Q. Jean Daniels used to supervise Theresa
17 Knapp-David, didn't she?

18 A. No.

19 Q. Jean Daniels used to be the director of
20 classification and movement.

21 A. No.

22 Q. I'm wrong about that.

23 MS. RUBINSTEIN: Jean Daniels.

1 THE WITNESS: Yes.

2 BY MR. KEACH:

3 Q. Didn't she used to work as either an assistant
4 director or director of classification and movement?

5 A. No.

6 Q. Well, what was her job before she became the -- I
7 forget what her title is her. Give me just a second.

8 What does associate personnel administrator mean?
9 What does that mean?

10 A. It's a grade supervisory position within the
11 bureau of personnel. It's a mid-level manager.

12 Q. So, did Jean Daniels ever work in the office of
13 classification and movement?

14 A. Not to my knowledge.

15 Q. I could be wrong, a lot of names are flying
16 around here, but it is my recollection that at some
17 point in time she was Theresa Knapp-David's supervisor
18 before she got promoted to that job.

19 A. No.

20 Q. Well, do you know whether any of your
21 subordinates had conversations with Ms. Knapp-David
22 about Mrs. Trostle?

23 A. I don't know.

1 Q. Would it cause you some concern in your decision
2 if there was personal animus between a supervisor and
3 someone who was recommended for demotion?

4 MS. RUBINSTEIN: Objection.

5 THE WITNESS: What do you mean personal
6 animus?

7 MR. KEACH: I mean like outright
8 personal hatred between the two people.

9 MS. RUBINSTEIN: Objection.

10 THE WITNESS: People don't have to like
11 each other, but they have to make sure that
12 they behave in the workplace between the
13 policies and the practices and conform to
14 the laws in the state. I mean, when there's
15 somebody that has personal feelings and then
16 there's true reasons for a demotion, the two
17 shouldn't intersect.

18 BY MR. KEACH:

19 Q. Well, let's assume they did in this case. Let's
20 assume that -- well, I don't agree. I think -- let me
21 just rephrase this.

22 Let's assume that there was just personal animus,
23 personal hatred, between Mrs. Trostle and Theresa

1 Knapp-David, and that is what underlined this decision
2 to demote her back to her hold item.

3 Would that cause you some concern?

4 MS. RUBINSTEIN: Objection.

5 BY MR. KEACH:

6 Q. That this decision was actually pretext for
7 personal animus.

8 MS. RUBINSTEIN: Objection.

9 You can answer, if you can.

10 THE WITNESS: And when you say that,
11 you mean the referral for demotion, because
12 the decision rested with me.

13 MR. KEACH: Yes. Correct.

14 THE WITNESS: So, could you rephrase it
15 for me.

16 BY MR. KEACH:

17 Q. Sure. The referral, if that was based on
18 personal animus and these other issues were just pretext
19 for personal animus, would that cause you some concern?

20 MS. RUBINSTEIN: Objection.

21 THE WITNESS: It would cause me
22 concern.

23 BY MR. KEACH:

1 Q. And just to wrap things up here, the information
2 that you had about Mrs. Trostle, that all originated
3 from Mr. Botsford and the people in classification and
4 movement, didn't it?

5 A. Yes.

6 Q. You relied on what he told you or what you were
7 informed by them to substantiate your decision against
8 Ms. Trostle.

9 A. What they told me and the supporting
10 documentation.

11 Q. And so, if there was a problem with some of that
12 supporting documentation, that could potentially
13 undermine your decision to take action here, couldn't
14 it?

15 MS. RUBINSTEIN: Objection.

16 THE WITNESS: Yes.

17 BY MR. KEACH:

18 Q. And so, we talked about 700 minutes worth of
19 phone calls.

20 Do you know the basis to coming up with the 700
21 minutes -- I'll take the 800 numbers out of here because
22 I'll concede that generally people don't call 800
23 numbers as part of their employment with the Department

1 of Correctional Services. It doesn't cost any money.

2 We agree that calling an 800 number from a state
3 phone doesn't cost the state any money, does it?

4 A. Just lost productivity.

5 Q. It's not like the state gets charged if someone
6 calls Delta Airlines 800 on their lunch hour, right?

7 A. No.

8 Q. So, when we're talking about these -- and I think
9 it was like 230 minutes worth of calls, if the
10 representations that were made to you that those 230
11 minutes worth of phone calls were all related to
12 Mrs. Trostle's personal matters and that representation
13 was false, that would also cause you some concern,
14 wouldn't it?

15 A. Yeah.

16 Q. And if the source of information that was
17 utilized to try to determine whether or not these phone
18 calls related to personal reasons was a Google search,
19 you'd have some concerns about the accuracy of that
20 determination, wouldn't you?

21 MS. RUBINSTEIN: Objection.

22 THE WITNESS: I don't know. I'd have
23 to...

1 BY MR. KEACH:

2 Q. Look at it more particularly.

3 A. Yeah.

4 Q. You would agree with me that a Spanish speaking
5 assistant director for classification and movement could
6 have cause to call Puerto Rico as part of her official
7 job duties with the state, wouldn't you?

8 A. I don't know about that.

9 Q. Well, can we establish -- you were a CO, right?

10 A. Mm-hmm.

11 Q. You had a whole bunch of people that you were
12 supervising as inmates that were of Spanish origin,
13 didn't you?

14 A. Yes.

15 Q. Reyes, Hernandez, Gonzalez; fair to say?

16 A. Yes.

17 Q. And some of the individuals could have loved ones
18 in Puerto Rico, couldn't they?

19 A. Yes.

20 Q. And so, if they called into the office of
21 classification and movement and for whatever reason,
22 Mrs. Trostle returned the phone calls because everybody
23 was overwhelmed, she could be talking to someone in

1 Puerto Rico about their loved one and where they're
2 going to be housed; isn't that right?

3 A. If the family member called in to class movement,
4 okay, I guess that could happen.

5 Q. Well, class and movement doesn't just address
6 where people go; it also addressed release dates,
7 doesn't it?

8 A. I mean, the facility inmate records coordinator
9 really is the one that coordinates the release dates,
10 but they oversee the IRCs. And we have a sentencing
11 review unit also.

12 Q. I'll give you a better example. It's my
13 understanding there's a policy in the state Department
14 of Corrections that, if someone has a loved one who is
15 dying, like a mother or a brother, a close relative,
16 that that person has the opportunity to go to that loved
17 one's funeral as long as they're escorted by someone
18 from the Department of Corrections.

19 Am I right about that?

20 A. It's not a right, but we do allow it.

21 Q. As long as the inmate reimburses the state for
22 the cost of going back and forth to the funeral or not.

23 A. I wish.

1 Q. But there's a policy. It's not a right, but it's
2 allowed under policy. Hey, an inmate had -- their
3 mother's dying. They've got a right to go have a
4 deathbed visit with that person --

5 A. Not a right.

6 Q. An opportunity to have a deathbed visit and an
7 opportunity to attend the funeral.

8 A. Opportunity, yes.

9 Q. And is that opportunity granted for people
10 outside the State of New York?

11 For instance, if you're from Florida and your
12 mother dies, do you have the ability to go to Florida or
13 is it just in the state?

14 A. In the state.

15 Q. What if the person can reimburse the state for
16 his travel expenses, would they be given the
17 opportunity?

18 A. No. Not to my knowledge. No. I don't grant
19 those approvals.

20 Q. And I think there were also some calls to Hawaii
21 on that list.

22 If an inmate's family called in from Hawaii and
23 made an inquiry, that would also be a reason for an

1 assistant director to call Hawaii, right?

2 A. Yes. I think it would be odd for families to be
3 calling class and movement, but could happen.

4 Q. So we can be clear, there could be calls to
5 Puerto Rico that were related to Ms. Trostle's official
6 duties, correct?

7 A. Yes.

8 Q. And there are calls to Hawaii that could be
9 related to Ms. Trostle's official duties, correct?

10 A. Could be.

11 Q. And I mean, do you know whether or not
12 Mrs. Trostle took a vacation to Hawaii?

13 Was that ever told to you?

14 A. No idea.

15 MR. KEACH: That concludes my
16 examination, absent any clarification that
17 Heather has.

18 MS. RUBINSTEIN: I have nothing.

19 (Deposition concluded at 2:36 p.m.)
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21
22
23

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1 STATE OF NEW YORK)

2 COUNTY OF

3

4 I, DANIEL F. MARTUSCELLO, III, do hereby certify that I
5 have read the foregoing record of my testimony taken at
6 the time and place noted in the heading hereof and that
7 it is a true and correct transcript of the same and the
8 whole thereof.

9

10

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12

13

DANIEL F. MARTUSCELLO, III

14 Subscribed and sworn to

15 before me this _____ day

16 of _____, 2014

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C E R T I F I C A T I O N

I, Jeanne O'Connell, Registered Professional Reporter
and Notary Public in and for the State of New York, do
hereby certify that the foregoing to be a true and
accurate transcription of the stenographic notes as
taken by me of the aforesaid proceedings.

11/10/14
Date


Jeanne O'Connell